

(2007) 08 DEL CK 0017

In the Delhi High Court

Case No : CS (OS) 1439 of 2004

Mother Dairy Fruit and Vegetable Private Limited and Another

APPELLANT

 V_S

Green Village Agros Pvt. Ltd.

RESPONDENT

Date of Decision : 31-08-2007

Acts Referred:

Copyright Act, 1957 — Section 2

Citation : (2007) 08 DEL CK 0017

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : Praveen Anand and Varun Menon, for the Appellant; ex parte, for the Respondent

Judgement

Sanjay Kishan Kaul, J.—The National Dairy Development Board (hereinafter referred to as the NDDB) was initially registered as a society under the Societies Act, 1860. The said NDDB is stated to have been merged with Indian Dairy Corporation, a company incorporated and registered under the Companies Act, 1956 by the NDDB Act, 1987 w.e.f. 05.9.1988. The NDDB under its Operation Flood is stated to have set-up the Mother Dairy Delhi in 1974 as also the Mother Dairy Fruit and Vegetable Project in the year 1988. In April, 2000, the NDDB transferred its rights, title and interest in these two projects to plaintiff no. 1 which had been set up as its 100% subsidiary. plaintiff no. 1 is a private limited company incorporated and registered under the Companies Act, 1956. plaintiff no. 1 subsequently established plaintiff no. 2 as its 100% subsidiary on 24.5.2002. Thereafter the brands remained the ownership of plaintiff no. 1 while the same were licensed to plaintiff no. 2 for purposes of manufacturing and marketing products.

2. The said two plaintiffs have filed the suit for permanent injunction restraining infringement of copyright, passing off, damages, rendition of accounts, delivery up etc. against the defendant in view of the defendant adopting the trademark "SAKAL", similar to the registered trademark of the plaintiffs" "SAFAL" and also

by reason of the defendant selling the product under identical label and packaging.

3. The plaintiffs claim that they are well established in their field and plaintiff no. 2 is an IS/ISO-9002, IS-15000 HACCP and IS-14001 EMS certified organization. plaintiff no. 2's Quality Assurance Laboratory is certified by the National Accreditation Board for Testing and Calibration Laboratory (NABL)-Department of Science and Technology, Government of India. plaintiff no. 2 markets and sells products under the trademarks: Mother Dairy, Dhara and Safal. The trademark "SAFAL" has been adopted for fresh fruits & vegetables, frozen vegetables and fruit juices. This trademark has been stated to be adopted by the plaintiffs in the year 1990. The plaint states that "SAFAL" is a coined word, derived by the plaintiffs from the two Hindi words "Sabzi" and "Fal" meaning "Vegetable" and "Fruit" respectively. It is, thus, claimed to be a fanciful and arbitrary mark in relation to fruits and vegetables. The plaintiffs, thus, claim a high degree of protection in the trademark in view the same being a coined word as also by use and adoption over a long period of time.

4. The plaintiffs claim to be the proprietor of the trademark "SAFAL" in respect of various goods falling in classes 29, 30, 31 and 32 as per averments in para-10 of the plaint. The plaintiffs have also sought to have created and conceived a unique packaging for their "SAFAL" brand of products, which is stated to constitute an original artistic work u/s 2(c) of the Copyright Act, 1957. The artistic work is stated to have been created in the year 1990. The logo "SAFAL" is stated to be registered with the Registrar of Copyrights under No.A-61541/2002. This art work in the packaging is stated to have contained certain key and essential features which are unique to the plaintiffs in respect of packaging of "frozen peas". Such peculiar features have been set out in para-12 of the plaint as under:

Front side:

The word SAFAL appears in red capital letters in English with the graphics of a fruit and a vegetable between the letters "A" and "F" at the centre of the polybag.

The word SAFAL appears in Hindi in a red font immediately below the English lettering.

Both the above words are encased in a rectangular yellow and green border.

The phrase "Select Frozen Peas" followed by its Hindi translation "Shrestha Frozen Matar" (transliterated) appears immediately below the above legend in a green rectangular box.

Green Solid circles (to represent peas) cover the entire front face of the poly bag.

The legend "Achha Hai Sachha Hai" appears at the bottom left of the polybag in red lettering.

A green square with a solid green circle (to represent the vegetarian nature of

the contents) at the exact center of the polybag, to the left of the legend "SAFAL" in a rectangle.

Back side:

The word SAFAL appears in red capital letters in English and Hindi in the same manner as on the front of the polybag, encased in a rectangular yellow and green border on the top left of the polybag.

Printed matter in two columns followed by the plaintiff's particulars, net contents, price, code number and date of packing along with a rectangle stating "Best before twelve months from packaging.

5. The plaintiffs claim to have spent a large amount running into crores of Rupees on advertisement as per details set out in para-13 of the plaint and the sales figures have been set out in para-14 of the plaint. The same are as under:

Year Advertisement and Promotional Expenditure 1998 - 1999 Rs.166 lakhs 1999 - 2000 Rs.246 lakhs 2000 - 2001 Rs.287 lakhs 2001 - 2002 Rs.485 lakhs (April 01 to June 02 - 15 months) 2002 - 2003 Rs.69.36 lakhs (July 02 - March 03 - 9 months) Year Sales 1998 - 1999 Rs.2075 lakhs 1999 - 2000 Rs.1715 lakhs 2000 - 2001 Rs.1498 lakhs 2001 - 2002 Rs.2631 lakhs (April 01 to June 02 - 15 months) 2002 - 2003 Rs.2167 lakhs (July 02 - March 03 - 9 months)

6. The plaintiffs claim to be taking due care to ensure that stringent standards of quality and hygiene are maintained in the packaging of their food articles sensitive to the needs of the market and consumers. In the month of July, 2004 the plaintiffs were informed that frozen peas were being sold in the market under the trademark "SAKAL" which is alleged to be a deceptively similar trademark as the plaintiffs' mark "SAFAL". It is also alleged that the packaging of the defendant was a direct and blatant copy of the plaintiffs' packaging. The deceptively similar packing is stated to be apparent from the scan images of the two marks which are as under:

6. The defendant's polybags are stated to be again identical reproductions to that of the plaintiffs as per the details set out in para-20, which are as under:

plaintiff's packaging Front side Defendant's packaging Front side

The word SAFAL appears in red capital letters in English with the graphics of a fruit and a vegetable between the letters "A" and "F" at the centre of the polybag

The word SAKAL appears in red capital letters in English at the center of the polybag

The word SAFAL appears in Hindi in a red font immediately below the English lettering

The word SAKAL appears in Hindi in a red font immediately below the English lettering

Both the above words are encased in a rectangular yellow and green border

Both the above words are encased in a rectangular red and green border

The phrase "Select Frozen Peas" followed by its Hindi translation "Shrestha Frozen Matar" (transliterated) appears immediately below the above

The phrase "Fresh Frozen Peas" followed by its Hindi translation "Taaza Frozen Matar" (transliterated) appears immediately below the above

legend in a green rectangular box A green square with a solid green circle (to represent the vegetarian nature of the contents) at the exact center of the polybag, to the left of the legend "SAFAL" in a rectangle

legend in a green rectangular box A green square with a solid green circle (to represent the vegetarian nature of the contents) at the exact center of the polybag, to the left of the legend "SAKAL" in a rectangle

A green square with a solid green circle (to represent the vegetarian nature of the contents) at the exact center of the polybag, to the left of the legend "SAFAL" in a rectangle

A green square with a solid green circle (to represent the vegetarian nature of the contents) at the exact center of the polybag, to the left of the legend "SAKAL" in a rectangle

A green square with a solid green circle (to represent the vegetarian nature of the contents) at the exact center of the polybag, to the left of the legend "SAFAL" in a rectangle

A green square with a solid green circle (to represent the vegetarian nature of the contents) at the exact center of the polybag, to the left of the legend "SAKAL" in a rectangle

The word SAFAL appears in red capital letters in English and Hindi in the same manner as on the front of the polybag, encased in a rectangular yellow and green border on the top left of the polybag. Printed matter in two columns followed by the plaintiff's particulars, net contents, price, code number and date of packing along with a rectangle stating "Best before twelve months from packaging".

The word SAKAL appears in red capital letters in English and Hindi in the same manner as on the front of the polybag, encased in a rectangular red and green border on the top left of the polybag. Printed matter in two columns followed by the plaintiff's particulars, net weight, price, batch number and date of packing along with a rectangle stating "Best before twelve months from the date of packaging".

7. It is the case of the plaintiffs that the association of the trademark/tradename "SAFAL" is so strong with the plaintiffs that any use of the said trademark or of any other trademark identical and/or deceptively similar thereto is inevitably

going to lead to an association in the minds of the consuming public of the plaintiffs and, thus, the consumers are likely to purchase the products of the defendant assuming the same to originate from the plaintiffs. It is pointed out that the trademark of the defendant is visually and phonetically similar to the plaintiffs' trademark, which is a material aspect, especially taking into consideration the fact that the name "SAFAL" is a coined word. The representation of the said name in Hindi is even more identical in view of the central alphabets being written almost identically.

8. The plaintiffs further claim that the defendant's attempt of deception is even fraudulent in view of the representation of the two logos, which are as under:

SAFAL SAKAL

9. In view of the aforesaid averments, the suit was filed and ad interim orders were granted on the interim application of the plaintiffs on 15.12.2004. The endeavor made to serve the defendant did not succeed and ultimately the defendant had to be served by publication. The defendant still did not choose to appear and was proceeded ex parte on 09.3.2007. The interim orders were made absolute on the same date.

10. The plaintiffs in support of their case have filed two affidavits of evidence. The first affidavit is of Mr. K.S. Mehta, Company Secretary and Authorised Signatory of plaintiff no. 1. Mr. K.S. Mehta has signed and verified the plaint and instituted the suit on behalf of plaintiff no. 1. He has also identified the signatures of Mr. Adarsh Kumar Khanna, former Managing Director and Authorised Signatory of plaintiff no. 2 who had signed and verified the plaint on behalf of the said plaintiff. The Board Resolution has been proved as Ex.PW1/1. The said witness, PW1, has affirmed to the averments as set out in the plaint. The said witness has proved the plaintiffs' original polybag as Ex.PW1/2 and the extracts from the trademark Journal bearing the advertisements of the plaintiffs' company trademark "SAFAL" as Ex.PW1/3 collectively. The certified copies of the copyright registration of the "SAFAL" label/logo and the Tear drop logo have been proved as Ex.PW1/4 and Ex.PW1/5 respectively. The defendant's offending polybag has been proved as Ex.PW1/7. The other promotional material of the plaintiffs has been collectively proved as Ex.PW1/8.

11. An affidavit has been filed of Mr. Y.K. Mathur, PW2, who is the Legal Manager of plaintiff no. 2 and has proved the letter of authority in his favor as Ex. PW2/1. The Board Resolutions in favor of Mr. Adarsh Kumar Khanna, who has signed and verified the plaint, have been proved as Ex. PW2/2.

12. The aforesaid facts have remained unrebutted.

13. The pleadings and documents filed on record show that the trademark of the plaintiffs "SAFAL" is well established. The word is stated to be a coined word not having any meaning by itself and a conjunction of two words. In the case of Plastindia Foundation Vs. Ajeet Singh and Another, the Court referred to the

judgment in *Reddaway v. Banham* (1896) 13 RPC 218 wherein the House of Lords have discussed about "coined words" in para-43, which reads as under:

Lord Herschell also dealt with "coined" words, that did not have any meaning in the language; and at page 228 line 19, said that "words never in use before, and meaningless, except as indicating by whom the goods in connection with which it is used were made, there could be no conceivable legitimate use of it by another person". Thus the "coined" "created", "Fancy" or "new" words which were not in use in any language before, and which did not have any meaning in the ordinary language, as evidenced by their absence in authoritative and standard language dictionaries, were the exclusive property of the person who first "coined", or created them and adopted them for use, and used it in connection with any article the only reason why a hitherto meaningless word would be used by another in connection with his activities would be to deceive the public, that the latter's article, thing or goods or the articles, thing, or goods of the former. He also observed that "he was unable to see why, more than in any other, to deceive purchasers into the belief that they are getting what they are not, and thus to filch the business of a rival.

Para 45...In case of fancy, invented, coined word the case is much easier, as a reference to the authoritative dictionaries of the language would clearly establish whether the word in question, exists in the language dictionaries, if not, it is a coined, fancy, invented word which is not a part of the language. Such word must be found to be owned by the person who has to devise the word, by applying the skill and labour rest, laid down in *inter alia* *C. Cunniah and Co. by partners C. Cunniah and Co. and Others Vs. Balraj and Co. and Another*, which test is applicable in all copyright cases.

14. The trademark adopted by the defendant "SAKAL" also apparently does not have any meaning and the aim and object appears to be to cause confusion and deception in the minds of the purchasing public in view of the phonetical similarity of the two trademarks. Chances of deception are higher on account of the fact that the same colour scheme and style of writing as also the packaging and polybags have been adopted by the defendant for the sale of the identical products. In the case of *Cadila Health Care Ltd. Vs. Cadila Pharmaceuticals Ltd.*, it was held that the principle of phonetic similarity cannot be jettisoned when the manner in which the competing words written are different. The products will be purchased by both villagers and townfolk, literate as well as illiterate and the question has to be approached from the point of view of a man of average intelligence and imperfect recollection. The purchase in India cannot be equated with a purchase of goods in England. Hence, in the present case, the chances of deception are even higher because of the nature of products which are not necessarily purchased by educated consumers. There may be those illiterate consumers including the domestic helps who go to the market to purchase such products.

15. I am, thus, of the considered view that there is a deliberate attempt on the

part of defendant to pass off its goods as that of the plaintiffs and there is both violation of the trademark of the plaintiffs and the words "SAFAL" by the use of the word "SAKAL" by the defendant as also violation of the copyright and the packaging. The defendant has also adopted in its logo a similar Tear drop as that of the plaintiffs.

16. The second aspect which is to be examined is in respect of the prayer for damages claimed by the plaintiffs. It is now a settled proposition of law that the defendant who chooses not to contest the matter and absents itself from the court proceedings should not be placed at a higher pedestal than a party who appears in Court. There cannot be any premium to a party absenting itself from the court proceedings. In this behalf, attention is invited to the observations made by this Court in *Pepsico Inc. and Ors. v. Sunrise Beverages* CS(OS) 651/2002; decided on 14.8.2007.

17. In *Asian Paints (India) Ltd. Vs. Balaji Paints and Chemicals and Others*, , in para-11 it has been held as under:

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.

18. I am, thus, of the considered view that keeping in mind the nature of deception, the violation of the trademark and copyright of the plaintiffs, the defendant is liable to pay to the plaintiffs damages of Rs.5.00 lacs.

19. A decree of permanent injunction is passed in favor of the plaintiffs and against the defendant restraining the defendant from infringing the plaintiffs' copyright and the products sold under the trademark "SAFAL" by the defendant adopting the trademark "SAKAL" and reproducing the packaging and art work

identical to that of the plaintiffs. The plaintiffs are also entitled to a decree of damages of Rs.5.00 lacs, payable by the defendant. The plaintiffs shall also be entitled to costs.

20. Decree sheet be drawn up accordingly.