
(2011) 12 DEL CK 0067
In the Delhi High Court
Case No : CS (OS) 290 of 2011

Mother Dairy Fruit and Vegetable Pvt. Ltd.	APPELLANT
Vs	
Mallikarjuna Dairy Products Pvt. Ltd	RESPONDENT

Date of Decision : 20-12-2011

Acts Referred:

Copyright Act, 1957 — Section 19, 2

Citation : (2012) 49 PTC 346

Hon'ble Judges : V.K. Jain, J

Bench : Single Bench

Advocate : Pravin Anand and Ms. Aparajita Rao, for the Appellant;

Judgement

V.K. Jain, J.—On the oral request of the learned counsel for the plaintiff, the plaintiff is permitted to file additional affidavit by way of evidence along with additional documents. The certified copy of the agreement between the plaintiff and NDDDB is exhibited as "Ex.PA" whereas the Extracts from Register of Copyrights are exhibited as "Exs.PB to PF". The plaintiff- Mother Dairy Fruit & Vegetable Private Limited is a wholly owned subsidiary of National Dairy Development Board, a body corporate constituted under National Dairy Development Board Act, 1987 and is engaged in the business of manufacturing and marketing of milk and milk products, frozen foods etc. The plaintiff has been marketing milk and milk products under the brand name "Mother Dairy". The plaintiff is also registered proprietor of various labels including label registered under registration number 1307520 in class 29 & 30, reproduced in para 13 of the plaint. The plaintiff also claims to be the first owner of the copyright in the artistic work of "Mother Dairy" (Blue Logo). The plaintiff claims to be incurring substantial expenditure on the promotion and advertisement of its products being sold under the aforesaid brand and logo. The plaintiff claims sale of Rs. 1,346.26 crores, 1,641.29 crores and 853.85 crores for the years 2005-2006, 2006-2007 and 2007-2008 respectively and has incurred advertising and promotional expenditure of Rs. 29.41 crores during the year 2005-2006 and Rs.

31.24 crores during the year 2007-2008. The plaintiff has adopted a wave design on the packaging in which milk is sold by it and is using that packaging for last 5-6 years. It is alleged that the aforesaid packaging along with its unique design has come to be identified exclusively with the milk products of the plaintiff. The sale of milk products of the plaintiff was Rs. 2,070 crores, 2,405 crores and 2,681 crores in the year 2007-2008, 2008-2009 and 2009-2010 respectively. The plaintiff incurred promotional expenditure of Rs. 29.19 crores, 46.53 crores and 30.32 crores respectively on the sale and promotion of its milk and its milk products alone during these years.

2. The defendant which is a dairy located in Andhra Pradesh is selling milk using a packaging/trade dress which is alleged to be a blatant rip off the plaintiffs packaging for the trade dress for the packaged milk. It is alleged that the packaging/trade dress being used by the defendant is also deceptively and confusingly similar to that of plaintiff and the defendant has slavishly reproduced the trade mark/logo/label and packaging of the plaintiff. The plaintiff claims protection under Copyright Act in respect of the artistic work involved in its logo and packaging. This is also the case of the plaintiff that the defendant is infringing its copyright in the aforesaid logo and packaging by using the impugned packaging for selling milk.

The plaintiff has accordingly sought an injunction restraining the defendant from using the impugned packaging or any other packaging which is deceptively similar to its trade mark and/or the work in which copyright is held by it. The plaintiff has also sought delivery up of the infringing material, rendition of accounts and damages amounting to Rs. 21,00,100/-.

3. Since no written statement was filed by the defendant despite service of last summons on 1st March, 2011, the right of defendant to file written statement was closed vide order dated 16th August, 2011 and the plaintiff was directed to file affidavit by way of evidence in order to satisfy the Court with respect to merits of its case.

4. The plaintiff has filed affidavit of its General Manager (Legal) Mr Y.K. Mathur by way of evidence. In his affidavit, Mr Mathur has stated that besides being registered proprietor of the trademark Mother Dairy, the plaintiff is also the owner of copyright in Mother Dairy logo which it has been using since the year 2003 which serves as a source identifier of the products of the plaintiff. This label, according to him, was created by a consultant for the plaintiff-company for remuneration and, therefore, the plaintiff is the first owner of copyright in the aforesaid logo. The letter from the consultant, acknowledging the aforesaid right, is Ex.PW-1/25.

5. During the course of arguments, the learned counsel for the plaintiff confined his arguments to infringement of the copyright which the plaintiff-company has in the artistic work involved in mother dairy (label) and the wave design being used by it on its packaging of the milk. Ex.PW-1/25 is the certificate issued by

Ray plus Keshvan Design Associates Private Limited, certifying that the Mother Dairy logo reproduced on the certificate was created by them for the plaintiff-company in January, 2008 and that all intellectual property rights in this logo rest with the plaintiff-company. The certificate Ex.PW-1/25 also amounts to assignment of the work in the aforesaid logo by Ray plus Keshvan Design Associates Private Limited to the plaintiff, within the meaning of Section 19 of Copyright Act. The plaintiff, therefore, now owns the copyright in the aforesaid logo with effect from the date of this order.

The plaintiff has today placed on record the certificates of registration Ex. DB to DF whereby the artistic work involved in a label, containing wave design being used by the plaintiff on the polybags in which milk is sold by it, was registered in favour of National Dairy Development Board. The aforesaid artistic work has been registered in a number of colours including blue colour. The plaintiff has also filed affidavit of Mr. Y.K. Mathur, Advocate, wherein he has stated that since at the time of the adoption of the aforesaid work the plaintiff was only a unit of NDDB, the copyright in the work was registered in favour of NDDB and when the Fruit and Vegetable unit of NDDB was registered as a separate entity under the name of Mother Dairy Fruit & Vegetable Private Limited, along with Mother Dairy Delhi project of NDDB, all the business interests of NDDB in Mother Dairy Delhi Project and the Fruit and Vegetable Project were assigned to the plaintiff Company through an assignment deed dated 31st March, 2000. He has also stated that the interests in the copyrights in the above referred packaging were a subject matter of the Mother Dairy Delhi Project and were assigned to the plaintiff Company vide assignment deed dated 31st March, 2000. Ex. DA is the copy of the assignment deed executed by NDDB in favour of the plaintiff. Clause 10 of the assignment deed, inter alia, provides that the plaintiff shall also be entitled to the transfer of all licenses including Trade Marks, if any, valid in relation to Mother Dairy, Delhi and Fruit and Vegetable Project, obtained by NDDB by Mother Dairy, Delhi, or Fruit and Vegetable Project. Since the above referred artistic work containing wave designs in various colours pertained to Mother Dairy Delhi Project of NDDB, the copyright in the aforesaid work stood transferred to the plaintiff in terms of the assignment deed Ex. DA.

It has thus been proved that the plaintiff holds copyright in respect of the artistic work involved in Mother Dairy(label) as well as in the artistic work containing wave design.

6. Ex.PW-1/36 is the packaging in which milk is sold by the defendant. Out of two packagings, forming part of PW-1/37, one is the packaging in which milk is sold by the defendant whereas the other one is the packaging in which the milk is sold by the plaintiff.

7. In R.G. Anand Vs. Delux Films and Others, Supreme Court, inter alia, laid down the following general propositions with respect to the copyrights:

1. There can be no copyright in an idea, subject matter, themes, plots or

historical or legendary facts and violation of the copyright in such cases is confined to the form, manner and arrangement and expression of the idea by the author of the copyright work.

2. Where the same idea is being developed in a different manner, it is manifest that the source being common, similarities are bound to occur. In such a case the courts should determine whether or not the similarities are on fundamental or substantial aspects of the mode of expression adopted in the copyrighted work. If the defendant's work is nothing but a literal limitation of the copyrighted work with some variations here and there it would amount to violation of the copyright. In other words, in order to be actionable the copy must be a substantial and material one which at once leads to the conclusion that the defendant is guilty of an act of piracy.

3. One of the surest and the safest test to determine whether or not there has been a violation of copyright is to see if the reader, spectator or the viewer after having read or seen both the works is clearly of the opinion and gets an unmistakable impression that the subsequent work appears to be a copy of the original.

4. Where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises.

5. Where however apart from the similarities appearing in the two works there are also material and broad dissimilarities which negative the intention to copy the original and the coincidences appearing in the two works are clearly incidental no infringement of the copyright comes into existence.

Supreme Court quoted with approval the following observations made by Copinger in his book on copyright (11th Edition):

What is protected is not original thought or information, but the original expression of thought or information in some concrete form. Consequently, it is only an infringement if the defendant has made an unlawful use of the form in which the thought or information is expressed. The defendant must to be liable, have made a substantial use of this form; he is not liable if he has taken from the work the essential, ideas however original, and expressed the idea in his own form, or used the idea for his own purposes.

8. The test to be applied by the Court, wherever infringement of copyright is alleged, is to ascertain not as to whether the work of the defendant is an exact re-production of the work of the plaintiff, but, whether a person who comes across the work of the defendant would form an opinion that it was the work of the plaintiffs or not. There is no test laid down to decide as to what constitute reproduction of a substantial part of the work. The test which the Courts have been applying in such cases is as to effect produced on the mind of the person who has seen the work of the plaintiff and also comes across the work of the

defendant. The degree of resemblance between two works must be such that it suggests an impression, in the mind of the observer, that the work of the defendant is, in fact, the work of the plaintiff. The Courts, therefore, are required to apply the test called the "lay observer test" and find out whether the object of the defendant appears to be the object of the plaintiff.

9. In order to constitute infringement of a copyright in a work, it is not necessary that the impugned work should be verbatim re-production of the work of the plaintiff. It would be sufficient to constitute infringement if a substantial or core part of work of the plaintiff is re-produced by the defendant. The defendant has every right to use the basic idea involved in the work of the plaintiff, but, he is not permitted to express that idea in the same form and the same manner in which it has been done by the plaintiff. What has to be seen in such a case is as to whether the defendant has merely made a fair use of the idea or has substantially appropriated the manner in which that idea has been depicted or expressed by the plaintiff. If the Courts insist on the work used by the defendant being an absolute replica of the work in which copyright is claimed by the plaintiff, any person seeking to make a dishonest use of the work of the plaintiff would make some changes here and there while copying the work of the plaintiff, so that in the event of being questioned, he may claim that the work being used by him not being an exact copy of the work of the plaintiff does not constitute infringement of the copyright of the plaintiff. The test to be applied by the Court, wherever infringement of copyright is alleged, is to ascertain not as to whether the work of the defendant is an exact re-production of the work of the plaintiff, but, whether a person who comes across the work of the defendant would form an opinion that it was the work of the plaintiffs or not. There is no test laid down to decide as to what constitute re-production of a substantial part of the work. The test which the Courts have been applying in such cases is as to effect produced on the mind of the person who has seen the work of the plaintiff and also comes across the work of the defendant. The degree of resemblance between two works must be such that it suggests an impression, in the mind of the observer, that the work of the defendant is, in fact, the work of the plaintiff. The Courts, therefore, are required to apply the test called the "lay observer test" and find out whether the object of the defendant appears to be the object of the plaintiff.

10. It can hardly be disputed that substantial artistic work is involved in drawing Mother Dairy (label) as well as the wave design forming part of the registered artistic work of the plaintiff. The label as well as wave design, therefore, constitute "artistic work" within the meaning of Section 2(c) of Copyright Act, which, in fact, makes it clear that a drawing would be an "artistic work" irrespective of whether the design possesses any artistic quality or not. A comparison of the packaging being used by the defendant with the packaging of the plaintiff would show that there is hardly any difference in the design of the logo being used by the defendant and the design of the logo of the plaintiff. The outer shape of both the logos is absolutely same. Both the logos have blue colour

in the background. The defendant has written "MORNING MILK" whereas the plaintiff has written "MOTHER DAIRY" in white letters, on blue background. There is one border line in white colour in the logo of the plaintiff whereas there are two border lines, in white colour, in the logo of the defendant. Conceptually and visually, the logo being used by the defendant is similar to the logo by the plaintiff except that the word "MOTHER DAIRY" in the logo of the plaintiff has been replaced by the words "MORNING MILK" in the logo of the defendant. By using the impugned logo, the defendant has reproduced a substantial part of the artistic work in which the copyright is held by the plaintiff Company.

11. The defendant, therefore, has clearly infringed the copyright of the plaintiff in Mother Dairy logo by using the impugned logo on the packaging in which milk is sold by it.

12. A comparison of the wave design on the packaging of the defendant with the wave design on the packaging of the plaintiff would show that like the plaintiffs, the defendant has also used blue colour to depict the design on its packaging. There are a number of curves in the work of the plaintiff. The curves are found also in the work of the defendant though they are not exactly of the same shape. The background colour is white on the packaging of the plaintiff as well as on the packaging of the defendant, the polybags in which milk is sold being of white colour. In my view, a person coming across the artistic work being used on the packaging of the defendant, is likely to form an opinion that the aforesaid work is the same which is found on the packaging of the plaintiffs. Considering the resemblance between the two works, the impression likely to be formed in the mind of a person who has earlier seen the packaging of the plaintiff and then comes across the packaging of the defendant, particularly considering the fact that milk is purchased by persons who may not necessarily be well-educated and who also come from comparatively lower strata of the society, would be that the work on the packaging of the defendant is that of the plaintiff.

13. It would be pertinent to note here that the defendant has not come forward to explain why he chose to use a packaging which contains a substantial reputation of the artistic work of the plaintiff. The obvious inference, therefore, is that the defendant by use of the impugned work wants to create confusion in the minds of the customers that he has some kind of connection or association with the plaintiff and thereby he wants to encash upon the reputation which the product of the plaintiff Company enjoys in the market.

14. For the reasons given in the preceding paragraphs, I hold that the packaging being used by the defendant for selling milk constitutes the infringement of copyright which the plaintiff Company has in the artistic work involved in the Mother Dairy(label) and the wave design being used by the plaintiff. The plaintiff, therefore, is entitled to injunction against use of the aforesaid packaging by the defendant.

15. As regards damages, it is now settled proposition of law that though the

plaintiff has not proved the actual damages suffered by it on account of infringement of its copyright by the defendant, it is still open to the Court to award punitive damages in appropriate cases. As observed by this Court in *Time Incorporated Vs. Lokesh Srivastava and Another*, punitive damages are founded on the philosophy of corrective justice and are meant to send signal to the wrong doers that the law does not take a breach by them as a matter between rival parties but is also concerned about those also who are not party to the lis but suffer on account of the breach of law on the part of wrong doer. As held by this Court in *Hero Honda Motors Ltd. Vs. Shree Assuramji Scooters*, this Court noticing that in a case where the defendant chooses to stay away from the proceedings of the Court, punitive damages need to be awarded, since otherwise the defendant, who appears in the Court and submits its account books would be liable for damages whereas a party which chooses to stay away from the Court proceedings would escape the liability on account of the failure of the availability of account books. In fact, punitive damages are appropriate relief where on account of absence of the defendant exact figure of the sale made and profit earned by him by infringing the trademark of the plaintiff and/or passing off his goods as those of the plaintiff cannot be ascertained. The Courts also take into consideration the fact that a lot of time and money is spent by trademark owners in litigation against those who infringe the trademark and try to encash upon the goodwill and reputation of other brands by passing off their goods and services as those of others. Award of punitive damages, therefore, describes dishonesty and curbs tendency to gain an unfair advantage by infringement of the legal rights of others. Failure of the Court to award punitive damages is likely to encourage unscrupulous persons actuated by dishonest intention, to use the trademarks of others and encash upon their goodwill and reputation which they have built with years of hard work and labour.

16. I am of the considered view that in the facts and circumstances of the case, the plaintiff should be awarded punitive damages amounting to Rs. 5 lakhs. A decree for injunction is hereby passed restraining the defendant from infringing copyright of the plaintiff in Mother Dairy (logo) as well as in the artistic work registered vide registration number A-6422 7/2003 by using the impugned packaging Ex.PW-1/36 or any other packaging which would infringe copyright of the plaintiff in the above referred works. The defendant is also directed to pay punitive damages amounting to Rs. 5 lakhs to the plaintiff along with cost of the suit.

Decree sheet be drawn accordingly.