

(2015) 07 DEL CK 0107

In the Delhi High Court

Case No : CS (OS) No. 144 of 2011

Mother Dairy Fruit and Vegetable Pvt. Ltd.

APPELLANT

Vs

Sri Vinayaka Milk Products

RESPONDENT

Date of Decision : 15-07-2015

Acts Referred:

Copyright Act, 1957 — Section 14(c), 2(c)
Trade Marks Act, 1999 — Section 2(zg)

Citation : (2015) 07 DEL CK 0107

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Nishchal Anand and Aman Taneja, for the Appellant

Judgement

Manmohan Singh, J—The plaintiff has filed the suit for permanent injunction, restraining infringement of trademark, copyright, passing off, damages, rendition of accounts, delivery up etc.

2. The defendant is ex-parte. No written statement has been filed.

3. The brief facts of the case as per the plaint are that the plaintiff, Mother Dairy Fruit & Vegetable Pvt. Ltd. is a company incorporated under the Companies Act, 1956, having its registered office at "Mother Dairy", Patparganj, Delhi- 110092. The plaintiff is engaged in the business of manufacturing and marketing of milk and milk products, frozen foods, horticultural and other agricultural products and having processing facilities at Patparganj and Mangolpuri Industrial Area, Delhi-110083.

4. The plaintiff currently markets & sells products under the following trademarks:

i. Mother Dairy (for Liquid Milk, Dahi, Ice Creams, Dairy Whitener and Butter) www.motherdairy.com;

ii. Dhara (for edible oils) www.dhara.in &

iii. Safal (for fresh fruits & vegetables, frozen vegetables and fruit juices etc),

5. The trademark "MOTHER DAIRY" was adopted by the plaintiff in the year 1974 and has been used by the plaintiff on every packaging material, invoices and /or advertisement that they have released and promotional material inter alia including handouts, POP materials, displays, banners, billboards etc., so much so that the consuming public and members of trade associate the said trademark and the goods under it to be emanating from the plaintiff alone.

6. The plaintiff has also been spending several crores of rupees towards promoting the said trademark and trade name in India and in other countries of the world to which the plaintiff exports its products under the said trademark "MOTHER DAIRY". The plaintiff has been advertising and promoting the said trademarks in various media including print and electronic having a widespread national and international reach and circulation.

7. The plaintiff is the registered proprietor of the well known trademarks MOTHER DAIRY and variations thereof as detailed in tabular form which has been mentioned in para 13 of the plaint.

8. The plaintiff has sought and been granted trademark registrations for their mark MOTHER DAIRY in various foreign jurisdictions inter alia the United Arab Emirates, Indonesia, Thailand and Malaysia as well.

9. As a result of the continuous and extensive use of the trademark MOTHER DAIRY over a long period of time spanning a wide geographical area coupled with vast promotion and publicity the said trademark enjoys an unparalleled reputation and goodwill in the market and has acquired the status of a "well known" trademark within the meaning of Section 2(zg) of the Trademarks Act, 1999.

10. The renowned and "well known" Mother Dairy blue trademark/logo, i.e. has been used since the year 2003 and is the most visible symbol/mark of the plaintiff and serves as a source identifier of the plaintiff's products in the market place. It is prominently visible on all of the plaintiff's products and also serves to act as a corporate device /symbol. The said logo/label was created on behalf of the plaintiff by a consultant for remuneration. The plaintiff has secured copyright registration for the said artistic work.

11. The "MOTHER DAIRY (Blue Logo) " even without the text therein has acquired distinctiveness to establish a connection with the products of the plaintiff in the minds of the consumers. Therefore, along with the trademark MOTHER DAIRY, the "MOTHER DAIRY (Blue Logo) " too has acquired the status of a "well known" trademark.

12. The abovementioned trademarks i.e. MOTHER DAIRY and the Mother Dairy (Blue logo) are used by the plaintiff on the packaging of its diverse range of products, promotional material as also its website. The said trademarks are also used on and referred to in various newspaper, magazine and website articles

about the plaintiff.

13. The plaintiff has expended considerable resources towards the promotion and advertisement of its goods including those under the trademark/logo "MOTHER DAIRY" and the "MOTHER DAIRY (Blue Logo) " which is evident from the Advertisement and Promotional expenditure details as given below:

14. The plaintiff's consistent efforts at promoting its products under the trademark "MOTHER DAIRY" and the "MOTHER DAIRY (Blue Logo) " coupled with the association in the minds of the consumers of such mark with the plaintiff and high quality of goods under its "MOTHER DAIRY" mark has resulted in extensive sales accruing to the plaintiff for its goods under the trademark "MOTHER DAIRY" and the "MOTHER DAIRY (Blue Logo) ". The sales figures of the plaintiff has been mentioned herein below:-

All the factors enumerated above have contributed not only to create immense goodwill and reputation around the mark "MOTHER DAIRY" and the "MOTHER DAIRY (Blue Logo) " but also in vesting the mark with the capacity of serving as a source indicator for the plaintiff.

15. The plaintiff markets and sells milk under the MOTHER DAIRY brand and the "MOTHER DAIRY (Blue Logo) " at a national level through its sales and distribution networks for marketing food items. The plaintiff sources significant part of its requirement of liquid milk from dairy cooperatives. It is the plaintiff's constant endeavor to:-

(a) Ensure that milk producers and farmers regularly and continually receive best market prices of their produce by offering quality milk.

(b) Ensure regular and continual supply of quality milk, milk products and other food products to the consumers at competitive prices and;

(c) Uphold institutional structures that empower milk producers and farmers through processes that are equitable.

16. It is stated that the processing of milk is controlled by process automation whereby state-of-the-art microprocessor technology is adopted to integrate and completely automate all functions of the milk processing areas to ensure high product quality/ reliability and safety. The plaintiff is an ISO-9001, ISO-14001 and ISO-22000 certified organization and hence adheres to international standards of quality in the food products and services.

17. The defendant Sri Vinayaka Milk Products, Plot No. 29, Road No. 3, Krishna Nagar Colony, Check Post, Hyderabad-500074 is manufacturing and selling identical products as that of the plaintiff i.e. Milk, under an identical trademark/ label/logo as that of the plaintiff apart from using a packaging/trade dress that is a blatant imitation of the plaintiff's packaging/trade dress for its packaged milk. The similarity is very evident from a side-by-side comparison of the two marks/ logos which has been reproduced herein below:

18. The impugned label/logo/trademark is conceptually and visually similar to the plaintiff's well known MOTHER DAIRY trademark and the "MOTHER DAIRY (Blue Logo) ". It is stated that the defendant writes "VINAYAKA MILK" in white inside the blue logo in a similar fashion as the plaintiff's Mother Dairy is illustrated/written within the "MOTHER DAIRY (Blue Logo) ". The impugned logo of the defendant also has a white border inside the blue logo, just as the plaintiff. The defendant appears to have simply inverted the logo/mark of the plaintiff and has misappropriated this logo as its trademark/logo.

19. The packaging/trade dress used by the defendant is also deceptively and confusingly similar to the plaintiff's "wave design" packaging/trade dress as illustrated herein below:-

On comparison of two rival products of two parties, it is quite clear that confusion and deception is created by the defendant. If test of an ordinary individual buying milk products is applied, a case of passing off and confusion is made out by the plaintiff. The products of the plaintiff and impugned products are sold side by side, as illustrated herein below:-

20. The artwork adopted by the defendant for its logo and packaging/trade dress of its impugned products is nothing more than a slavish reproduction of the plaintiffs' logo and packaging/trade dress for its products. The plaintiff's MOTHER DAIRY blue logo and trade dress is an original artistic work under Section 2(c) of the Copyright Act, 1957. The plaintiff being the owner of the copyright subsisting in the logo and packaging/trade dress is entitled to the exclusive rights provided in Section 14(c) of the Copyright Act, 1957. From a perusal of the two logos it is clear that the defendant's impugned logo is not an original artistic work within the meaning of the Copyright Act. The art work of the MOTHER DAIRY blue logo and the wave design is associated solely with the plaintiff and the defendant's reason to come up with such a deceptively similar variant or one that is a substantial reproduction is solely to come as close as possible to the plaintiff's packaging/trade dress. This is a clear case of infringement of the plaintiff's copyright in the said logo and packaging and is a violation of the plaintiff's rights in the same.

21. It is averred that infringing activities of the defendant was noticed by the plaintiff in the month of November 2010. On receiving this information, the plaintiff took immediate action and after ascertaining the defendant's address and whereabouts, sent the defendant a cease and desist notice dated 22nd November 2010 clearly informing the defendant of the plaintiff's rights to the trademark/logo Mother Dairy and its packaging for Milk products and directing the defendant to stop its infringing activity. An undertaking was also sent to the defendant for its signatures in order to amicably resolve the matter. The notice was returned as undelivered. The plaintiff had sent the notice to the address mentioned on the packaging of the defendant's products. Thereafter the plaintiff after ascertaining the defendant's whereabouts from its representatives in the area identified another address of the defendant and issued another notice dated

9th December 2010 along with an undertaking was sent to the defendant which was once again returned as undelivered. At the time the present suit was instituted, to the best of the plaintiff's knowledge the defendant was located and was operating out of the two addresses mentioned herein above. By order dated 21st January, 2011 this Court had passed an ex-parte ad- interim injunction against the defendant.

22. The plaintiff sells its products all over the country, including in Hyderabad where the defendant is carrying out its illegal activities. It is submitted by the plaintiff that the possibility of confusion being caused by the defendant's adoption of the impugned mark which is deceptively similar to the plaintiff's MOTHER DAIRY (blue logo) and the trade-dress used for its packaging is very high and in fact inevitable due to the following reasons:

- a. The defendant is selling identical products under a deceptively similar trademark and packaging.
- b. The plaintiff's and the defendant's products are sold through the same trade channels.
- c. Since milk is a necessary commodity, the classes of consumers purchasing the said products would include a large segment of the illiterate and semi-illiterate population.

The defendant by its adoption and use of the impugned mark and the packaging/ trade dress is clearly attempting to pass off its goods as those of the plaintiff. This is in clear violation of the plaintiff's common law as well as statutory rights in the MOTHER DAIRY (blue logo) trademark and the trade dress used for its milk products. The sale and distribution of the impugned products has resulted in great harm prejudice to the plaintiff's business, rights and interests apart from amounting to tarnishment and dilution of the plaintiff's reputation and goodwill. The plaintiff is suffering huge losses and damages due to the blatant and outright violation of its rights by the defendant.

23. Even otherwise, with regard to colour combination, get-up and layout, there are number of decisions in which the law has been laid down that if a party intentionally tries to copy the design on the commercial articles, the rightful owner may obtain an interim order by filing a suit for passing off or infringement of copyright.

(i) In the case of *Vicco Laboratories, Bombay Vs. Hindustan Rimmer, Delhi*, AIR 1979 Delhi 114 the case of the plaintiff before Court was that the plaintiffs have been marketing the cream in a collapsable tube of 3 different sizes which has the distinctive get up etc. The collapsable tube has red background with floral design in yellow colour under the trade mark "Vicco Turmeric Vanishing Cream" in the carton as well as tube in yellow strip in the bottom. The case against the defendant was that they have been marketing the vanishing cream in the carton and tube which are a colourable imitation of the plaintiff's carton and tube

under the trade mark "Cosmo". This court granted the injunction against the defendant and held at para 13 as under:-

"The plaintiffs claim passing off by the defendants of their product as and for the product of the plaintiff's on the basis of copy of the distinctive get up and colour scheme of the collapsible tubes and the cartons by them. The defendants are not entitled to represent their goods as being the goods of the plaintiffs. The two marks "Vicco" and "Cosmo" used by the plaintiffs and defendants respectively are no doubt different and the mark "Cosmo" by itself is not likely to deceive but the entire get up and the colour scheme of the tube and the carton adopted by the plaintiffs and the defendants are identical in every detail and are likely to confuse and deceive the customer easily. The get up and the colour scheme of the plaintiff"" adopted in every detail by the defendants for their tube and carton cannot be said to have been adopted by the defendants unintentionally."

(ii) In the case of Nova Ball Bearing Industries Vs. Mico Ball Bearing, (1981) 19 DLT 20 , it has been held at para 7 as under:-

"A comparison of the two cartons "NOVA" and "JANI" would reveal that two cartons are exactly similar in size, colour scheme and get up, the only difference that the trade mark of the defendants is written at 5 places and that of the plaintiff at 3 places. The two cartons bear such a close resemblance that they can easily confuse and deceive a customer."

(iii) In Cases and Material on Trade Mark and Allied Laws, Vol.I at Page No. 969, Muller & Phipps International Corporation & another v. Anita Cosmetics & another, following observations are made at para 5 page No. 971:-

"It is true that the use of the mark COUNTESS by itself is not likely to deceive the customers. But if the two containers CUTICURA and COUNTESS are put side by side, it becomes apparent that in the get up, colour scheme and the similarity the containers are so similar that they easily confuse and deceive the customers. The defendant No. 1 has adopted the get up and colour scheme of the container to the plaintiffs" in every detail and they are identical in appearance."

(iv) In the case of Sodastream v. Thorn Cascade Co Ltd., reported at 1982 RPC 459, the plaintiffs were marketing the gas cylinders of grey colour under their trade mark "sodastream" and the defendants having also been marketing their black colour cylinders under their own trade mark "Thorn Cascade", the proposals of the defendants to refill the grey colour gas cylinders of the plaintiff, even with their own trade mark amounts to passing off as the grey colour cylinder is distinctive of the plaintiffs in respect of which the reputation accrued in favour of the plaintiffs. Interlocutory injunction granted.

(v) In another case reported in 1972 RPC 1, Hoffmann-La Roche & Co. A.G. v. D.D.S.A. Pharmaceuticals Limited, the plaintiffs manufactured and marketed chlordiazepoxide in distinctive black and green capsules bearing the word "Roche" on each capsule, the defendants also marked and advertised the drug

chlordiazepoxide in black and green 10mg capsules which were identical to those of the plaintiffs except that they bore the letters "DDSA" instead of the plaintiffs' name. The plaintiffs were granted interlocutory injunction to restrain the defendants from passing off capsules of the patented drug as the goods of the plaintiffs. It was held that marketing of the capsules by the defendants is almost identical to those of the plaintiffs was calculated to cause damage to the plaintiffs. It was further held that there was a likelihood of confusion as both the capsules contained the same drug. The public were not concerned with the identity of the manufacturing of the capsules as long as the capsules contained the same substance and had the same effect.

24. In Karly's Law of Trade Marks and Trade Names, the test of confusion and deception has been discussed in detail in para 838 of 9th Edition which reads as under:

"Two marks, when placed side by side, may exhibit many and various differences, yet the main idea left on the mind by both may be the same. A person acquainted with one mark, and not having the two side by side for comparison, might well be deceived, if the goods were allowed to be impressed with the second mark, into a belief that he was dealing with goods which bore the same mark as that with which he was acquainted. Thus, for example, a mark may represent a game of football; another mark may show players in a different dress, and in very different positions, and yet the idea conveyed by each might be simply a game of football. It would be too much to expect that persons dealing with trade marked goods, and relying, as they frequently do, upon marks, should be able to remember the exact details of the marks upon the goods with which they are in the habit of dealing. Marks are remembered rather by general impressions or by some significant detail than by any photographic recollection of the whole. Moreover, variations in detail might well be supposed by customers to have been made by the owners of the trade mark they are already acquainted with for reasons of their own."

25. In order to establish their case, the plaintiffs have proved the following documents:-

(i) Letter of Authority issued by Plaintiff in favour of Mr. Naveen Rastogi, dated 26th May, 2015 has been exhibited as Exhibit PW-1/1;

(ii) Copy of the Power of Attorney executed by Mr. Nagarajan Sivaramakrishanan, Managing Director of the Plaintiff No. 1, dated 26th August 2014 in favour of Mr. Lalit Prabhkar has been exhibited as PW 1/2;

(iii) Extracts of the minutes of the Board Meeting authorizing Mr. Nagarajan Shivaramakrishanan to represent the Plaintiff. has been exhibited as Ex.PW 1/3;

(iv) Copy of power of attorney in favour of Mr. Y.K. Mathur dated 2nd November, 2010 has been exhibited as Ex.PW 1/4;

(v) Copy of certificate of incorporation of the plaintiff has been exhibited as

Ex.PW 1/5;

(vi) Copies of Point of Purchase display, banners and other promotional materials has been exhibited as Ex.PW 1/6;

(vii) Copies of the various newspapers, magazines and websites articles about the plaintiff No. 1 has been exhibited as Ex.PW 1/7;

(viii) Original samples of the plaintiff's product packaging has been exhibited as Ex.PW 1/8;

(ix) Certificate for use in legal proceedings of the trademark bearing Registration No. 956474 has been exhibited as Ex.PW 1/9;

(x) Certificate for use in legal proceedings of the trademark bearing Registration No. 947721 has been exhibited as Ex.PW 1/10;

(xi) Certificate for use in legal proceedings of the trademark bearing Registration No. 1308510 has been exhibited as Ex.PW 1/11;

(xii) Certificate for use in legal proceedings of the trademark bearing Registration No. 1196584 has been exhibited as Ex.PW 1/12;

(xiii) Certificate for use in legal proceedings of the trademark bearing Registration No. 1196582 has been exhibited as Ex.PW 1/13;

(xiv) Certificate for use in legal proceedings of the trademark bearing Registration No. 130858 has been exhibited as Ex.PW 1/14;

(xv) Certificate for use in legal proceedings of the trademark bearing Registration No. 1308509 has been exhibited as Ex.PW 1/15;

(xvi) Certificate for use in legal proceedings of the trademark bearing Registration No. 956470 has been exhibited as Ex.PW 1/16;

(xvii) Certificate for use in legal proceedings of the trademark bearing Registration No. 1308507 has been exhibited as Ex.PW 1/17;

(xviii) Certificate for use in legal proceedings of the trademark bearing Registration No. 1196586 has been exhibited as Ex.PW 1/18;

(xix) Certificate for use in legal proceedings of the trademark bearing Registration No. 1160157 has been exhibited as Ex.PW 1/19;

(xx) Certificate for use in legal proceedings of the trademark bearing Registration No. 1196585 has been exhibited as Ex.PW 1/20;

(xxi) Certificate for use in legal proceedings of the trademark bearing Registration No. 1196587 has been exhibited as Ex.PW 1/21;

(xxii) Certificate for use in legal proceedings of the trademark bearing Registration No. 1196588 has been exhibited as Ex.PW 1/22;

- (xxiii) Certificate for use in legal proceedings of the trademark bearing Registration No. 1307520 has been exhibited as Ex.PW 1/23;
- (xxiv) Certificate for use in legal proceedings of the trademark bearing Registration No. 1308506 has been exhibited as Ex.PW 1/24;
- (xxv) Certificate for use in legal proceedings of the trademark bearing Registration No. 1308508 has been exhibited as Ex.PW 1/25;
- (xxvi) Certificate for use in legal proceedings of the trademark bearing Registration No. 1190761 has been exhibited as Ex.PW 1/26;
- (xxvii) Copies of the certificates evidencing the foreign trademark registrations for the mark MOTHER DIARY in; United Arab Emirates, Indonesia, Thailand, Malaysia has been exhibited as Ex.PW 1/27 (colly);
- (xxviii) Copy of the Copyright Registration Certificate for the MOTHER DIARY Blue Logo has been exhibited as Ex.PW 1/28 (colly);
- (xxix) Certificate issued by the plaintiff's Chartered Accountant displaying the sales turnover along with the advertisement and promotion expenses has been exhibited as Ex. PW 1/29;
- (xxx) Copies of ISO certificates issued to the plaintiffs has been exhibited as Ex. PW 1/30 (colly);
- (xxxi) Original packaging for the plaintiff's packaged milk products has been exhibited as Ex.PW 1/31 (colly);
- (xxxii) Printouts from the plaintiff's website regarding the milk products sold under the MOTHER DIARY has been exhibited as Ex.PW 1/32;
- (xxxiii) Legal notice dated 22nd November, 2010 along with annexure has been exhibited as Ex.PW 1/33;
- (xxxiv) Legal notice dated 9th December, 2010 along with annexure has been exhibited as Ex.PW 1/34;
- (xxxv) Original packaging of the plaintiff's packaged milk has been exhibited as Ex.PW 1/35;
- (xxxvi) Original packaging of the defendant's Vinayaka Milk has been exhibited as Ex.PW 1/36;
- (xxxvii) Images of plaintiff's and defendant's products being sold together has been exhibited as Ex. PW 1/37;
- (xxxviii) Copies of sample invoices evidencing sales of the plaintiff's products in Hyderabad has been exhibited as Ex. PW 1/38;
- (xxxix) An original brochure regarding the launch of the plaintiff's packaged milk products in Hyderabad has been exhibited as Ex. PW 1/39;

(xl) Original Flyer has been exhibited as Ex.PW 1/40;

(xli) Original card bearing contact details for the plaintiff's consumer complaints cell in Hyderabad has been exhibited as Ex. PW 1/41.

26. In view of the above, the plaintiff is entitled for decree for permanent injunction in terms of para 37 (i) to (iv) of the plaint :

i. restraining the defendant, its partners or proprietor as the case may be, their principal officers, servants and agents from manufacturing, selling, offering for sale or distribution, advertising, directly or indirectly dealing in Milk products or goods, of any description bearing the Mother Diary trademark/label or any mark/label that is identical to the plaintiff's trademark or any other mark/label which is deceptively similar to the plaintiff's trademark/label amounting to infringement of registered trademarks as enumerated in the plaint;

ii. restraining the defendant, its Directors, partners or proprietors as the case may be, their officers, servants, agents and representatives from infringing the plaintiff's copyright in the artistic work in its Mother Diary logo including the artistic work in its product packaging/trade dress by reproducing the said artworks in any manner for its products amounting to infringement of copyright;

iii. restraining the defendant, its Directors, partners or proprietors as the case may be, their officers, servants, agents and representatives from using the Mother Diary trade/label mark or any other deceptively similar variant of the plaintiff's trademark/label on its product packaging / label and/ or advertising, directly or indirectly either its business or its products, by using the aforesaid trademark and/or any other mark deceptively similar to the plaintiff's trademarks/label and/or in any manner whatsoever doing any other thing as may be likely to cause confusion or deception amounting to passing off their products and business as and for those of the plaintiff;

iv. restraining the defendant, its Directors, partners or proprietors as the case may be, their officers, servants, agents and representatives from using the Mother Diary trade/label mark or any other deceptively similar variant of the plaintiff's trademark/label on its product packaging / label and/ or advertising, directly or indirectly either its business or its products, by using the aforesaid trademark and/or any other mark deceptively similar to the plaintiff's trademarks/label and/or in any manner whatsoever doing any other thing as may be likely to cause confusion or deception amounting to passing off their products and business as and for those of the plaintiff.

Punitive damages

27. With regard to the relief of damages as claimed by the plaintiff in para 37(vii) of the plaint, this Court has previously granted both exemplary and punitive damages against the Defendants in ex-parte matters of similar nature. In Time Incorporated Vs. Lokesh Srivastava and Another, (2006) 131 CompCas 198 : (2005) 116 DLT 599 : (2005) 30 PTC 3 while awarding punitive damages of Rs. 5

lakhs in addition to compensatory damages also of Rs. 5 lakhs, Justice R.C. Chopra observed that "time has come when the Courts dealing in actions for infringement of trademarks, copyrights, patents etc., should not only grant compensatory damages but also award punitive damages with a view to discourage and dishearten law breakers who indulge in violation with impunity out of lust for money, so that they realise that in case they are caught, they would be liable not only to reimburse the aggrieved party but would be liable to pay punitive damages also, which may spell financial disaster for them."

28. Further, this Court in Microsoft Corporation Vs. Rajendra Pawar and Another, (2008) 36 PTC 697 decided on 27th July, 2007 has held "Perhaps it has now become a trend of sorts, especially in matters pertaining to passing off, for the defending party to evade court proceedings in a systematic attempt to jettison the relief sought by the plaintiff. Such flagrancy of the Defendant's conduct is strictly deprecatory, and those who recklessly indulge in such shenanigans must do so at their peril, for it is now an inherited wisdom that evasion of court proceedings does not de facto tantamount to escape from liability. Judicial process has its own way of bringing to tasks such erring parties whilst at the same time ensuring that the aggrieved party who has knocked the doors of the court in anticipation of justice is afforded with adequate relief, both in law and in equity. It is here that the concept of awarding punitive damages comes into perspective."

29. The suit of the plaintiff is also decreed in terms of prayer clause 37 (vii) of the plaint. The other reliefs are given up by the plaintiff's counsel.

30. Decree be drawn accordingly.