

(2019) 02 DEL CK 0045

In the Delhi High Court

Case No : Civil Suits (COMM) 17 Of 2018, Civil Miscellaneous 218, 219, 16420 Of 2018

M/S. Hira Sweets & Confectionary Pvt. Ltd& Ors

APPELLANT

Vs

Hira Confectioners

RESPONDENT

Date of Decision : 01-02-2019

Acts Referred:

Copyright Act, 1957 — Section 2(c)

Citation : (2019) 2 AD(Del) 661

Hon'ble Judges : Manmohan, J

Bench : Single Bench

Advocate : Umesh Mishra, Vishal Patel

Final Decision : Disposed Off

Judgement

Manmohan, J

1. Present suit has been filed for permanent injunction restraining infringement and passing off of trademark, copyright, damages, delivery upetc.The prayer clause is reproduced hereinbelow:-

"(a) That this Hon'ble Court may kindly be pleased to restrain the defendant, its proprietor, partners, associates, sister concerns, dealers, distributors through themselves and through servants, agents, assigns and representatives and all other acting for and on their behalf from manufacturing, selling, offering for sale, advertising directly and indirectly dealing in impugned goods and business included in Class- 30 and 43 bearing the impugned trademark/ trade name HIRA CONFECTIONERS or any other trademark as may be identical with or deceptively similar to plaintiff's said trademark/label HIRA SWEETS, which results in infringement of said trademark/label/trade name of plaintiffs.

(b) That this Hon'ble Court may kindly be pleased to restrain the defendant, its proprietor, partners, associates, sister concerns, dealers, distributors through themselves and through servants, agents, assigns and representatives and all

other acting for and on their behalf from manufacturing, selling, offering for sale advertising directly and indirectly dealing in impugned goods included in Class-30 and Class-43 bearing the impugned artistic work HIRA CONFECTIONERS or any other artistic work as may be identical with or deceptively similar to plaintiff's said artistic work HIRA SWEETS, which results in infringement of said artistic work of plaintiffs.

(c) That this Hon'ble Court may kindly be pleased to restrain the defendant, its proprietor, partners, associates, sister concerns, dealers, distributors through themselves and through servants, agents, assigns and representatives and all other acting for and on their behalf from manufacturing, selling, offering for sale advertising directly and indirectly dealing in impugned goods included in Class-30 and Class-43 bearing the impugned trademark/trade name HIRA CONFECTIONERS or any other trademark/trade name as may be identical with or deceptively similar to plaintiff's said trademark/label HIRA SWEETS, which results in passing off of said trademark/label of plaintiffs.

(d) That this Hon'ble Court may kindly be pleased to restrain the defendant, its proprietor, partners, associates, sister concerns, dealers, distributors through themselves and through servants, agents, assigns and representatives and all other acting for and on their behalf from manufacturing, selling, offering for sale advertising directly and indirectly dealing in impugned goods included in Class-30 and Class-43 bearing the impugned artistic work HIRA CONFECTIONERS or any other artistic work as may be identical with or deceptively similar to plaintiff's said artistic work HIRA SWEETS, which results in passing off of said artistic work of plaintiffs.

(e) for an order for delivery up by the defendant to the plaintiff all the offending goods bearing the impugned trademark/trade name/label/artistic work including the packaging materials, advertising materials, publicity materials, stationary, account books and other incriminating materials under the possession and control of the defendant for destruction or erasure purposes.

(f) Pass a decree of damages in favour of the plaintiffs and against the defendant on account of loss to the business and reputation caused to the plaintiffs by illegally and unlawfully using the trade mark/trade name/label/artistic work HIRA CONFECTIONERS by the defendant.

(g) for an order for costs of the proceedings in favor of the plaintiffs and against the defendant.

(h) Pass such other or further orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case."

2. Vide order dated 08th January, 2018, this Court had granted an ex parte ad interim injunction in favour of the plaintiffs and against the defendant. The relevant portion of the ex-parte injunction order is reproduced hereinbelow:-

"Consequently, till next date of hearing, the defendant, its proprietor, partners,

agents, assigns, representatives, heirs, servants, dealers, distributors, franchisees and/or anyone acting for and on their behalf are restrained from opening any further outlet using the impugned trade mark/label HIRA CONFECTIONERS and the tag line "Shahdara ki Mashoor Balushahi Nirmata".

3. The defendant entered appearance and filed its written statement. However, as none had appeared for the defendant on the last two dates of hearing and the defendant's right to file admission/ denial was closed on 25th January, 2019, it is proceeded ex parte.

4. At this stage, learned counsel for the plaintiff gives up prayers 35 (e) and (f) of the prayer to the suit. The statement made by learned counsel for plaintiff is accepted by this Court and plaintiff is held bound by the same.

5. This Court is also of the view that the present suit can be disposed of without any further delay. A Coordinate Bench of this Court in *Satya Infrastructure Ltd. and Ors. Vs. Satya Infra & Estates Pvt. Ltd.*, 2013 SCC OnLine Del 508 has held as under:-

"I am of the opinion that no purpose will be served in such cases by directing the plaintiffs to lead ex parte evidence in the form of affidavit by way of examination-in-chief and which invariably is a repetition of the contents of the plaint. The plaint otherwise, as per the amended CPC, besides being verified, is also supported by affidavits of the plaintiffs. I fail to fathom any reason for according any additional sanctity to the affidavit by way of examination-in-chief than to the affidavit in support of the plaint or to any exhibit marks being put on the documents which have been filed by the plaintiffs and are already on record. I have therefore heard the counsel for the plaintiffs on merits qua the relief of injunction."

6. In the plaint it is averred that the predecessor of the plaintiffs in 1912 started the business of selling sweets with only one outlet on the outskirts of Delhi (Shahdara). It is averred that the predecessor of the plaintiffs conceived and adopted the trademark/label HIRA SWEETS in 1960.

7. It is stated in the plaint that the plaintiffs through their predecessor are the original conceiver, adopter and users of the artistic work HIRA SWEETS and the same is original artistic work within the meaning of Section 2(c) of the Copyright Act, 1957 having unique colour combination layout lettering style in relation to the aforesaid goods since 1960. It is emphasised in the plaint that the plaintiff no. 1 is the registered proprietor of the original artistic work HIRA SWEETS.

8. It is stated that the plaintiff no.1 became the registered proprietor of the mark and device HIRA SWEETS under Classes 29, 30, 32 and 43 of the Trade Marks Act, 1999 in 2016.

9. It is also averred in the plaint that since 1984 the plaintiffs have been opening outlets of HIRA SWEETS in various parts of Delhi.

10. It is further averred in the plaint that the plaintiffs, since their adoption of the trademark HIRA SWEETS through their predecessor in interest, have been continuously doing business of preparation and sale of sweets, namkeen, pastry, rusk, bread, biscuits, chocolates, bakery items, ice creams, soft drinks, snacks milk etc. It is stated in the plaint that the plaintiffs enjoy immense goodwill and reputation in the said business using the trade mark/label HIRA SWEETS.

11. It is the case of the plaintiffs that the annual revenue generated by the plaintiff no. 1 and plaintiff no. 3 under the trade mark/label/artistic work HIRA SWEETS in the financial year 2016-2017 was Rs. 6,20,00,000/- and Rs.16,87,00,000/- respectively, and the annual revenue generated by the plaintiff no. 2 in the year 2017 was Rs.12,59,52,397/-.

12. It is stated in the plaint that in 2014 the defendant applied for registration of the trademark/device HIRA under Class 30 of the Trade Marks Act, 1999 claiming user since 12th November, 2008 and the same is pending.

13. It is stated in the plaint that in the second week of November, 2015, the plaintiffs came to know through market sources regarding the unauthorized and illegal use of the similar trademark/trade name HIRA CONFECTIONERS by the defendant in the identical business of identical goods as that of the plaintiffs. It is stated in the plaint that the plaintiff no.1 issued a cease and desist notice dated 23rd November, 2015, and a reminder notice dated 26th February, 2016 to the defendant, to which the defendant requested the plaintiff not to take any legal action and promised to stop the use of the mark HIRA CONFECTIONERS.

14. Learned counsel for the plaintiffs states that in the second week of December 2017 the plaintiffs came to know that the defendant instead of closing the said outlet has opened another outlet in Sector-12, Dwarka, New Delhi and is doing business in the name of HIRA CONFECTIONERS.

15. He states that the defendant has adopted the trade mark/label/trade name HIRA CONFECTIONERS which are identical with and deceptively similar in each and every aspect, including phonetically, visually and structurally to the trade mark/label/trade name of the plaintiffs. According to him, the imitation is in exactitude of copying in such manner that the consumers are bound to be confused/ deceived.

16. Learned counsel for the plaintiffs states that the plaintiffs in their packaging material/sweetmeat boxes used to write "Delhi (Shahdara) Ki MashoorBalushahi Wale" which is also being copied by the defendant by writing "Shahdara ki Mashoor Balushahike Nirmata". He further states that the malafide intent of the defendant is apparent from application dated 28th December, 2015 wherein the defendant applied for registration of the tagline "Sahadra K MashoorBalushahi Wale" which is identical/deceptively similar to the plaintiff's tagline. He states that the defendant in its application is claiming user since 11th May, 2012.

17. He states that the defendant adopted and started using the impugned trade

mark/label HIRA CONFECTIONERS in respect of impugned goods and business with a view to take advantage and trade upon the reputation and goodwill of the plaintiff and further with a view to create confusion to pass off its impugned goods and business as those of the plaintiffs.

18. Learned counsel for the plaintiffs lastly states that it is fourth generation of the plaintiffs that is using the impugned mark.

19. In the opinion of this Court, the defendant has no real prospect of defending the claim, as although it entered appearance and filed its written statement, it has not conducted admission denial and has stopped appearing.

20. Further, the plaintiffs are the registered owners of the trade marks in question.

21. In the opinion of this Court, the triple identity test is also satisfied as the defendant has made use of an identical/deceptively similar trademark in relation to identical goods having an identical trade channel.

22. In view of the above, the present suit is decreed in favour of the plaintiffs and against the defendant in accordance with prayer 35 (a) to (d) of the present plaint along with actual costs. The costs shall amongst others include lawyers' fees as well as the amounts spent on purchasing the Court fees. The plaintiffs are given liberty to file on record the exact cost incurred by them in adjudication of the present suit, if not already filed. Registry is directed to prepare a decree sheet accordingly.

23. With the aforesaid observations, present suit and pending application stand disposed of.