

(2014) 02 DEL CK 0038
In the Delhi High Court
Case No : C.S. (OS) 851/2012

Sanjay Kapur

APPELLANT

Vs

Dev Agri Farms Pvt. Ltd.

RESPONDENT

Date of Decision : 28-02-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 4
Copyright Act, 1957 — Section 2(c)
Trade Marks Act, 1999 — Section 2(zb)

Citation : (2014) 59 PTC 93

Hon'ble Judges : Jayant Nath, J

Bench : Single Bench

Advocate : Prathiba M. Singh and Suhasini Raina and Archana Sahadeva, Advocate for the Appellant; K. Datta and Satyajit Sarna, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Jayant Nath, J.

IA No. 5961/2012 (Order 39 R. 1 & 2 CPC) & IA No. 7602/2012 (Order 39 Rule 4) in CS(OS) 851/2012

1. The present application of the plaintiffs for interim stay being I.A. No. 5961/2012 came up for hearing for the first time before the court on 30.03.2012 when this court passed an ex parte ad interim injunction restraining the defendant to export or sell their tea products i.e. "BAGAN Fresh Tea? in the packaging which is either identical or deceptively similar to the plaintiffs' packaging or to open other retail outlets in Delhi to sell their product under the deceptively similar packaging till further orders. The defendant has thereafter moved an application being IA No. 7602/2012 under Order 39 Rule 4 CPC seeking vacation of the said stay. Notice was issued on the said application on 25.04.2012. The present order disposes off the said two applications. The accompanying plaint is filed by the plaintiffs seeking a decree to restrain the

defendant, etc. from selling, advertising, etc tea powder/tea products sold as "BAGAN fresh Tea" or any other hot beverage products in packaging which is either identical or deceptively similar to the plaintiffs packaging or which is a colourable imitation or substantial reproduction of the plaintiffs' packaging. Other connected reliefs including decree for rendition of accounts are also sought.

2. The plaintiffs state in the plaint that they set up their sole proprietorship concern "Aap Ki Pasand" in 1981 and since then they made it the most reputed name in the luxury segment of the tea market. The plaintiffs further submit that in 1981, he innovated a new way and manner of packaging their tea. The innovative features and element of the said packaging included packing tea in a soft paper packet shaped in a rectangular sided cuboid. This packet is slipped into a fabric sleeve and is closed at top by a traditional drawstring/dori. The said pack is then decorated with ribbon and the label tied around the fabric bag. Lastly the finished and ornamented pack is slipped inside a glossy see-through poly sleeve. The plaintiffs claim to have carved a distinct niche for themselves in the tea market owing to the said unique packaging and excellent quality of products sold by them.

3. In 1981, it is stated that they opened their first tea boutique in Delhi. It is further stated that the plaintiffs' products have been exported to various countries, their products are sold in all duty free shops in India at International Airports and are also procured by the Cottage. Industries, Emporia in Delhi and Indian Tourism Development Corporation for their various outlets and supplied to Air India for its-in-flight sale. Some of the earlier orders were from Maurya Sheraton in 1984 and Hyatt Regency, Delhi in 1983 & 1984. Various other such examples are stated. The details of the plaintiffs' turnover are given in para 12 of the plaint. As per the said para, the sales figure for the year 2010-11 is Rs. 5,49,68,752/- whereas the exports are nearly Rs. 76 lacs.

4. It is stressed that the trade dress of the plaintiffs consists of distinctive elements which are completely unique and unknown prior to the plaintiffs having commissioned their first packaging. The details of the uniqueness of the packaging are elaborated in para 13 of the plaint and the relevant description reads as follows:--

? "The soft paper pouch of cuboidal/rectangular shape, designed to make a unique look stand-up soft pack;

? The cuboidal shape is adorned with a textile packing bag over the primary cuboidal paper pouch;

? The packing bag is ornamented with a drawstring on top and flat rectangular bottom which facilitates a stand-up pouch;

? Only Indian look fabrics are used for the packaging;

? The ornamentation with a centralised label and a ribbon to finish it constitutes a typical trade dress;

? The cuboidal shape is volume efficient as it makes a big faced pack. It is a tall look pack, albeit, flat in depth, that makes a large face of the pack. This facilitates many marketing messages over a large face of pack;

? The cuboidal and flat bottom pack with a fabric bag is light in weight and hence economical to transport even by air, SAN-CHA brand even today is exported by air as it is an economical and efficient (airworthy of freight) in freight cost;

? Last but not the least, the packing bag (in various textiles) has an Indian look and Indian feel;"

5. Hence, it is urged that packaging is unique and distinctive and is protectable under the statute and under common law including under law of passing off. It is further urged that the packaging is innovative/creative and is a original artistic work u/s 2(c) of the Copyright Act, 1957 and is capable of protection.

6. It is further urged that in 2011, it was revealed to the plaintiffs that the "defendant's product has identical packaging, ornamentation, colour range, material etc. used for loose tea. The look of the defendant's product from a distance would give an unmistakable impression of the plaintiffs' product. Hence, it is urged that the defendant has copied and imitated the packaging of the plaintiffs. The imitation is completely dishonest and a mala fide attempt to take advantage of the hard-earned market built by the plaintiffs. The defendant has started selling the infringing packet only few months back. The plaintiffs are stated to have protested in mid 2011. Hence, the present suit has been filed.

7. The defendant has contested the claim of the plaintiffs and has filed its written statement. The defendant states that they have been marketing teas in fancy Indian patterned fabric gift packs since 2008 and have built up a significant reputation and market.

8. It is firstly urged that the packaging that the plaintiffs seek to restrain is generic and has no distinctive value qua its products. It is urged that in order to increase export of tea from India various players in the said industry have come with different unique ideas. To give an Indian touch various traders and packers have started packaging in small pouches and have added a design to lure foreign buyers to buy tea in said pouch as gift articles/souvenirs. Hence the get-up of the plaintiff, signifying an Indian origin with traditional fabric pouches, it is stated is absolutely generic to the trade. It is further urged that there are several other players in the market segment who are using decorative packaging. Some of the players have been in the market for over 50 years. Reference is made to some of them like Golden Tips, Mittal Group of Companies and New Directions Exports and Crafts.

9. It is further stated that the decoration qua the pouch on the basis of which plaintiffs are claiming distinctiveness is actually something that is freely available in the market and various expensive merchandize products and gifts are often sold in this kind of pouch to give the product a feeling of Indianness and

distinctiveness. In fact, it is urged that these pouches are freely exchanged between people on important occasions such as weddings and festivals like Diwali, etc. and these pouches have existed for many years before the plaintiffs commenced trading.

10. It is secondly urged that the packaging which plaintiffs seek to protect is actually a packaging which serves a useful purpose, namely, preserving tea and its delicate flavour. If the tea is sold in bulk, it can be sold in wooden chests or paper sacks, etc. In retail when it is sold in small quantity," it must be sold in small packages which keep it dry, air tight and safe from being crushed. It is further urged that most of the tea producers who package and sell tea to retail consumers focusing on the gift and export market have the following requirements:- (a) packaging must be airtight, (b) packaging must be traditional or ethnic and indicate an Indian origin or connection, (c) packaging must be light and retail sized and (d) appearance of gift wrapping must be there.

11. It is next urged that the drinkers of tea are very particular about the brand of tea they consume, for example Earl Grey, Oolong, etc. Hence, - when they go to a store or emporium, consumers search for brand or search for a variety of leaf. No consumer of tea will associate a brand of tea with a vague or a generic method of packaging. It is further urged that regular tea available in Indian market costs about Rs. 500/- per Kg. However, gift packed aromatic organic teas cost upto Rs. 20,000/- per Kg. The tea packaged and sold by the plaintiffs and defendant costs roughly around Rs. 4,000/- per Kg and is therefore consumed by rich and educated strata of society who cannot possibly be deceived by mere resemblance of tea based on a generic mode of packaging.

12. It is fourthly urged that there are various distinguishing factors in the style and get up of the two brands and the consumers are hence able to distinguish between the same. It is urged that the pouches of the defendant bear the label "BAGAN Fresh" in a very conspicuous manner dispelling any apprehension whatsoever of any customer or consumer being deceived. The logo of the plaintiffs is different from the logo of the defendant. The brand, of the plaintiff "Aap Ki Pasand? is printed in gold with a wreath whereas the _ brand of the defendant "BAGAN Fresh" is printed within a green box also depicting a yellow green leaf. There is stated to be a marked difference in colour scheme of both the brands. Various other features are listed to try and argue that there are many dis-similarities between the packaging and get" up of the plaintiffs and defendant.

13. It is next urged that the defendant has been in the market since 2008 and the plaintiff has failed to raise any objection. Hence, it is urged that the present suit is a belated attempt to suppress competition inasmuch as the defendant has acquired considerable goodwill and made a name for itself in the market with its latest advent into Delhi Airports and the defendant poses a serious threat to the business of the plaintiffs.

14. Learned counsel for the plaintiff has strenuously urged that the plaintiffs have designed a unique and innovative way of packaging their tea using ethnic Indian fabric material. She relies on various documents filed along with the plaint to submit that the plaintiff enjoys a great reputation and goodwill including the unique packaging. Reliance is placed on Section 2(zb) of the Trade Marks Act whereunder trademark is now expressly defined to mean a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and includes the shape of goods, their packaging and combination of colours. Reliance is placed on the photographs of the packaging of the plaintiff which are filed along with the plaint and also the photographs of the packaging being used by the defendant to submit that the defendant is malafidely copying the trade dress of the plaintiff with an attempt to pass off its goods as that of the plaintiff. Reliance is placed on the annual turn-over of the plaintiff which is placed on record where it is claimed that for the Financial Year 2010-11 the plaintiff No. 1 had a turn-over of A5.49 crores and plaintiff No. 2 had a turnover of Rs. 75.5 lacs. Reliance is also placed on various advertisements issued pertaining to the product of the plaintiff starting from an advertisement issued in the Economic Times on 11.01.1992. Reliance is placed on copies of Advertisements issued for the plaintiffs product on 09.11.1993, 16.11.1993, 20.07.1996, 25.08.1996, and so on which have been placed on record. It is urged that the documents of the plaintiffs show that the plaintiff had been extensively advertising for now nearly 30 years. Reliance is also placed upon certain orders received on 19.11.1985 and 08.05.1986 from the Ministry of External Affairs in connection with the visit of the Prime Minister of India abroad to Japan and African countries respectively. Another such communication is dated 14.6.2010 in connection with the visit of the Prime Minister to Canada for G-20 Summit. Reliance is also placed upon an Order dated 8.11.1984 received from Hotel Hyatt Regency, Delhi and dated 24.9.1985 from Hotel Maurya Sheraton. It is further urged that the trade mark of the plaintiff i.e. San-cha (Label) is duly registered as per Registration Certificate dated 08.08.1989. Based on the above submissions it is urged that the unique packaging of the plaintiff with its various distinguishing features elaborated as above is closely identified with the product of the plaintiff. It is urged that the packaging now introduced by the defendant is a dishonest attempt to pass off its product as that of the plaintiff and hence it is urged that the ex parte interim order passed by this Court on 30.3.2012 should be continued till pendency of the present suit.

15. Learned counsel for the plaintiffs relies upon the judgment in the case of Heinz Italia and Another Vs. Dabur India Ltd., where the Hon'ble Supreme Court held that colour scheme and overall effect of the packaging has to be seen. The said judgment relied upon the case of Cadila Health Care Ltd. Vs. Cadila Pharmaceuticals Ltd., where it was held that in a passing of action similarities rather than dissimilarities have to be taken note of by the court. Reliance is also placed on the case of Parle Products (P) Ltd. Vs. J.P. and Co., Mysore, where the

court was of the view that in a passing off action minor details are not to be looked into but the broad features. Reliance is also placed on the case of Gorbatschow Wodka K.G. Vs. John Distilleries Limited, where the Bombay High Court held that the expression trade mark is now expressly defined and includes the shape of the goods. In that case the court based on the material placed on record by the plaintiff prima facie held that integral part of the plaintiffs product lies in the shape of the bottle in which the Vodka is sold though the shape of the bottle has no functional relationship with the nature or quality of the product. Reliance is also placed on the case of Reckitt and Colman Products Ltd. v. Borden Inc. and Ors., 1990 (RPC) 341 where it was held that passing off action is possible on the get up of the plaintiffs goods. Reliance is also placed on the judgments in the cases of Baker Hughes Limited and Another Vs. Hiroo Khushalani and Another, ; Baker Hughes Ltd. and Another Vs. Hiroo Khushalani and Another, ; Laxmikant V. Patel Vs. Chetanbhat Shah and Another, ; Pankaj God v. Dabur India Ltd., 2008 (38) PTC 49 (Del) (DB); Satyam Infoway Ltd. Vs. Sifynet Solutions Pvt. Ltd., : 2004 (28) PTC 566 (SO) and Info Edge (India) Pvt. Ltd. and Another Vs. Shailesh Gupta and Another, to contend that get up of the good can be a basis for a passing off action in the facts and circumstances of the present case.

16. Learned counsel appearing for the defendant on the other hand has urged that there are enough reasons to vacate the interim orders passed by this Court. It is strenuously urged that firstly the trade dress which is being used by the plaintiff is quite common to the trade inasmuch as packaging using traditional Indian fabric is a common occurrence. It is urged that there are already eight to ten manufacturers/dealers in the market using a trade dress akin to that of the plaintiff. It is secondly urged that the trade dress of the plaintiff has no innovation nor is it unique in any manner. Hence, it is urged that the said trade dress is entitled to no protection. It is thirdly urged that even if the trade dress was similar where the trademarks are different there would be no question of passing off and no injunction should be granted. It is fourthly urged that the present application of the plaintiff and" reliefs sought are liable to be rejected on account of delay and laches. It is " urged that the defendant has been in the market since 2008 and has carved out a market and place for itself. Hence, it is urged that the present suit filed in 2012 and on account of this delay the plaintiff is not entitled to any interim relief. It is further urged that the present litigation is only an attempt to stifle competition as the defendant has made a name for itself.

17. Learned counsel for the defendant relies upon the judgment of the Division Bench of this High Court in the case of Kellogg Company Vs. Pravin Kumar Bhadabhai and another, to contend that where even prima facie get ups are similar, the fact that the brand's name is prominently displayed on the different packets would make it a fit case for not grant of interim injunction. Reliance is also placed on Samsonite Corporation Vs. Vijay Sales, where this court held that the plaintiff has to establish that its trade dress or get up has become by use

distinctive of the plaintiffs goods. The word "distinctive" would be taken as meaning factually distinctive and not mere assertion. The plaintiff has to establish that the trade dress or get up of the plaintiff has become associated exclusively with the products of the plaintiff. Reliance is also placed on the judgment of England and Wales High Court (Chancery Division) in the case of *M. Saper LD. v. Specter's LD. And Boxes Ltd.*, 13 (R.P.C.) 218 where it was held that competition must remain free inasmuch as the defendant does no wrong by entering in the market created by another and competing with its creator.

18. It is true that under the Trade Marks Act, 1999 the shape of a good has been included in the definition of trade mark. The relevant portion of Section 2(zb) reads as follows:--

"(zb) "Trade Mark" means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colour"

19. The Bombay High Court in the case of *Gorbatschow Wodka KG. v. John. Distilleries Ltd.* (supra) while dealing with the shape of a bottle of Vodka on facts based on material placed on record by the plaintiff noted that prima facie the plaintiff has established a reputation and integral part of the reputation lies in the shape of the bottle in which the Vodka is sold. In paras 17 the court held as follows:--

"17. Prima facie, a comparison of the shape of the bottle which has been adopted by the defendant with the bottle of the plaintiff would show us striking similarity. As a matter of fact, counsel appearing on behalf of the defendant did, during the course of the submission, concede that there are similarities. Counsel, however, sought to urge that there are differences between the shape of the bottle which has been adopted by the plaintiff and shape of the bottle that has been adopted by the defendant and these differences would emerge if the bottles \\ were to be compared, as it were, side by side.

20. The court in the above case further held that the defendant is engaged in the same trade and it was impossible to accept that the defendant would not have been conscious of the shape which was used by the plaintiff for its bottle of Vodka. The adoption of the shape by the defendant was held to be prima facie not honest. The court in the facts granted an appropriate interim injunction in favour of the plaintiff.

21. Similarly the Hon"ble Supreme Court in the case of *Heinz Italia & Anr. v. Dabur India Ltd.* (supra) which pertains to an action against the defendant from using the mark and the deceptive packaging in paragraph 18 held as follows:

"18.... We are of the opinion however that the colour scheme and the overall effect of the packaging has to be seen. We have also examined Item D individually which is the exclusive" packaging for Glucose-D; the one on the

extreme left being the packaging in the year 1989, the one in the middle being the one for the year 2000 (which is impugned in the present suit) and the third on the extreme right which is the subject-matter of the suit in Calcutta which has been stayed on the application made by the respondent. We are of the opinion that the packaging of Glucose-D and Glucon-D is so similar that it can easily confuse a purchaser. We also feel that mere fact that the respondents have time and again made small changes in their packaging, is an attempt to continue to mislead the purchaser and to make it more difficult for the appellants to protect their mark, which the record shows has acquired an enviable reputation in the market which is sought to be exploited by the respondent."

22. The real issue is as to whether the plaintiff by long user can claim exclusive rights to the trade dress/packaging being used by it.

23. Lets come to the facts of this case. As per the plaint and the accompanying documents, the plaintiffs have started using the innovative manner of packaging of their tea since 1981. The unique part of the packing features are reproduced in para 5 above. Photographs of the packaging/pouch are filed. They were also produced physically in Court. The sales figures of plaintiff No. 1 are placed on record, which reads as follows:--

The sales figure of plaintiff No. 2 are stated as follows:--

24. These figures are duly supported by a certificate of Mr. V.K. Thapar Chartered Accountant. The plaintiff has also placed on record advertisements, newspaper features and communications-to show that the product is being advertised right since the beginning. The advertisements relate to and are from the year 1992 onwards. Advertisements issued in the Economic Times, The Pioneer, Times of India, Swagat In-flight magazine of Indian Airlines, etc. have been placed on record. Reliance is also placed on orders received from Ministry of External Affairs in connection-with the visit of the Prime Minister abroad. A communication dated 19.11.1985 from the Ministry of External Affairs placing an order for tea caddies and in connection with the Prime Ministers visit to Japan is on record. Similar is an order dated 08.05.1986 in connection with the Prime Minister's visit to African countries. Similar correspondences pertaining to similar other foreign delegations are also placed on record. The plaintiff has also placed on record an order dated 08.11.1984 received from hotel Hyatt Regency Delhi and an order dated 24.09.1985 from Hotel Maurya Sheraton, New, Delhi. On the basis of long usage for the last more than 30 years and on the basis of this reputation and turnover and its niche mark, the plaintiff has strenuously urged that the packaging of the plaintiff is unique, innovative and in the market the packaging is commonly associated as of belonging to the plaintiffs and their products.

25. What is the effect of the above evidence placed on record by the plaintiff. The advertisements clearly show the product of the plaintiff including the packaging that is being used and on account of which the plaintiff has filed the present Suit

for action of passing off. The advertisements start from 1992. The turn-over of the plaintiff is placed on record supported by a certificate of the Chartered Accountant. The turnover is stated to be attained in the form of sales through the said packaging which is subject matter of the present Suit. The usage of the brand in the packaging is long and reasonably extensive. The plaintiff has prima facie proved that the packaging which is subject matter of the present Suit which is described in para 5 above is in long use by the plaintiff. The long user by the plaintiff is not really denied. The evidence also prima facie for the purpose of disposal of this application shows that the trade dress/package of the plaintiff is part of the essential features on the basis of which the product of the plaintiff is identified. The trade dress/package is prima facie "distinctive and forms an intrinsic part of the goodwill and reputation of the plaintiff in the market"..

26. What has been strenuously urged by the learned counsel for the defendant is that the trade dress being; used by the plaintiff is common in the trade and that it is essentially a traditional Indian fabric which is used by various manufactures and producers in the market including the defendant and there is no innovation involved in the same. It is further urged that there are 8 to 10 other manufactures and dealers in the market which use trade dress akin to that of the plaintiff.

A perusal of the photographs placed on record by the plaintiffs and the packets that were produced during the course of arguments would show that the packaging being used by the plaintiffs has some unique features. It is no doubt that it is using Indian fabric but that per se is not the only feature of the packaging. The cuboidal/rectangular shape with the unique stand-up pack with Indian look fabric with the traditional dori on top with a glossy packing is being used.

The defendant has placed on record some photographs of packaging used by other manufactures. Even in the written statement the defendant has depicted pictures of packaging being used by other manufacturers. A close look of these pictures would show that all kinds of packaging are being used by the said so called other manufacturers some of which are using the traditional Indian fabric. Only some of the packaging appears to be some what identical to that of the plaintiff. However there are no details placed on record of the date since when these packaging are used by the said manufactures and the extent of market that they have. The said instances placed on record by the defendant appear to be stray incidents and do not in any way dilute the case of the plaintiff. Even otherwise, the use of similar marks or trade dress by a third party cannot be a defence to an illegal act of passing off. Reference may be had to the judgment of this Court in the case of Pankaj Goel v. Dabur India Ltd., (supra).

27. Learned counsel for the defendant has also relied heavily on the judgment of the Division Bench of this High Court in the case of Kellogg Company v. Pravin Kumar Bhadabhai & Anr. (supra) to contend that where the trade mark is being used on the packaging there can be no question of passing off based on

packaging.

28. A perusal of the said judgment would show that it was based on the facts of the case. The plaintiff in that case had filed the Suit with a grievance that the carton in which the defendant was selling corn flakes was more or less similar in size to that of the plaintiffs carton and that the carton was likely to confuse buyers of corn flakes and there was every likelihood of the consumers purchasing the defendant's goods in the belief that they were of the plaintiff/appellant. The learned Single Judge came to a conclusion that the trade dress of the defendant in that case was entirely different from the trade dress of the plaintiff and there is absolutely no scope for confusion. In the appeal based on the facts, the Division Bench stated that there were no grounds made out to interfere with the order of the learned Single Judge refusing injunction.

29. Learned counsel appearing for the plaintiff has strenuously urged that even otherwise the judgment in Kellogg Company v. Pravin Kumar Bhadabhai & Anr. (supra) is no longer a good law and that this was noted by this "Court in the case of N. Ranga Rao and Sons Vs. Anil Garg and Others, . However, I need not go into this submission in view of the fact that in my view the Kellogg's judgment was made based on the facts that the trade dress of the defendant was entirely different from the trade dress of the plaintiff and there was absolutely no scope for confusion.

30. Another contention which has been strenuously" urged by the defendant is that the defendant claims to have been using velvet pouches for packing its product since 2008 and claims that the plaintiff has needlessly delved in filing of the present Suit and that the defendant has in the meantime carved a market for itself. This submission has to be rejected. The defendant has not really been able to show that it has been, using identical packaging as that of the plaintiff since 2008.

31. As far as the defendant's contention is concerned the first thing that strikes one's mind is that there is a complete absence of any attempt to show the turnover of the defendant in the tea market or the extent of use of the packaging akin to that of the packaging of the plaintiff.

The defendant has placed on record copies of the invoices which it has raised for sale of its tea-products starting from 2008. A perusal of these invoices would however show that the defendant is using all kinds of packages for marketing its product. For example, Invoice No. 002 dated 20.08.2008 shows use of velvet pouch, jute pouch, paper mache box, gift pack etc.

One also cannot help noticing that the defendant has placed on record three bills from one Kailash Chand dated 28.11.2008, 01.12.2008 and 30.12.2008 stating purchase of velvet bags. The purpose of these bills is to obviously try and show that the defendant has been using the velvet pouch since 2008. However, these invoices would show that the bills are though dated over a period of almost one month, all bear invoice numbers in sequence. Namely, bill dated 28.11.2008

bears bill No. 332, bill dated 01.12.2008 bears bill No. 333 and bill dated 30.12.2008 bears bill No. 334. Clearly not much reliance can be placed on these documents. The contention of defendant cannot be accepted.

32. Reference now may be had to the observations of the Supreme Court in the case of Laxmikant V. Patel v. Chetanbhai Shah & Anr., (supra) where in paragraph 13 the Hon"ble Supreme Court has held as follows:--

"13. In an action for passing-off it is usual, rather essential, to seek an injunction, temporary or ad-interim. The principles for the grant of such injunction are the same as in the case of any other action against injury complained of. The plaintiff must prove a prima facie case, availability of balance of convenience in his favour and his suffering an irreparable injury in the absence of grant of injunction. According to Kerly (ibids para 16.16) passing-off cases are often cases of deliberate and intentional misrepresentation, but it is well-settled that fraud is not a necessary element of the right of action, and the absence of an intention to deceive is not a defence, though proof of fraudulent intention may materially assist a plaintiff in establishing probability of deception. Christopher Wad low in Law of Passing-Off (1995 Edition, at p.3.06) states that the plaintiff does not have to prove actual damage in order to succeed in an action for passing-off. Likelihood of damage is sufficient. The same learned author states that the defendant's state of mind is wholly irrelevant to the existence of the cause of action for passing-off (ibid, paras 4.20 and 7.15). As to how the injunction granted by the Court would shape depends on the facts and circumstances of each case. Where a defendant has imitated or adopted the plaintiffs distinctive trade mark or business name, the order may be an absolute injunction that he would not use or carry on business under that name, (Kerly, ibid, para 16.97)."

33. In my view the plaintiffs have made out a prima facie case of long continuous user of the trade dress/packaging which is the subject matter of the present Suit. The nature and extent of the user by the defendant of the Packaging/Trade Dress which is subject matter of this suit is not clear. Balance of convenience would hence be in favour of the plaintiff and against the defendant. The plaintiffs are likely to suffer an irreparable loss and injury in case, ex parte injunction granted by this Court is not continued.

34. In view of the above, the present application IA No. 5961/2012 is allowed and the defendant is restrained From selling or dealing with tea products in packaging using the brand name "BAGAN Fresh" which is identical or deceptively similar to the plaintiffs packaging as depicted by the plaintiff in the documents filed alongwith the plaint and as elaborated in paragraph 5 above till pendency of the accompanying suit. IA No. 7602/2012 under Order 39 Rule 4 CPC filed by the defendant is dismissed.

C.S. (OS) No. 851/2012

List before the Joint Registrar on 14th March 2014 for further proceedings.