

---

**(2014) 12 DEL CK 0367**  
**In the Delhi High Court**  
**Case No : CS(OS) 1063/2009**

Shahnaz Hussain

APPELLANT

Vs

Her Ever Ruth and Others

RESPONDENT

---

**Date of Decision :** 02-12-2014

**Acts Referred:**

Trade Marks Act, 1999 — Section 2(1)(h), 29(1), 29(2)

**Citation :** (2014) 12 DEL CK 0367

**Hon'ble Judges :** G.S. Sistani, J

**Bench :** Single Bench

**Advocate :** Raunaq Kamath, Advocates for the Appellant

---

## **Judgement**

G.S. Sistani, J.—Plaintiff has filed the present suit for permanent injunction restraining infringement of trade mark, passing off, rendition of accounts, delivery up etc.

2. It is pointed out by counsel for the plaintiff that on 10.08.2010, learned counsel for defendant No. 2 had made a statement that defendant No. 2 is neither manufacturing nor selling nor distributing "Nature's Gold" including range of NATURE'S Gold Skin Radiance Gel or any other product deceptively similar to that of plaintiffs product. Counsel for defendant No. 2 reiterates the statement made in Court on 10.08.2010.

3. In view of the statement made on behalf of defendant No. 2 on 10.08.2010, which has been reiterated today, as agreed by counsel for the parties, present suit is disposed of qua defendant No. 2. Defendant No. 2 shall remain bound by the statement made by counsel on 10.08.2010 and reiterated today.

4. Learned counsel for the plaintiff points out that despite service through publication in the newspapers "Dainik Jagran" and "Statesman" dated 18.04.2011, defendant No. 1 has chosen not to appear in this matter and defendant No. 1. Defendant No. 1 was proceeded ex parte vide order dated 28.05.2012.

5. Counsel further submits that the present plaint is duly supported by the affidavit of authorized signatory of the plaintiff and the plaint itself should be read as affidavit by way of evidence. It has been averred in the plaint that the plaintiff is a pioneer and undisputed leader in herbal beauty care and is engaged in the formulation and marketing of Ayurvedic formulations for skin, hair and body care, as well as in the running of franchise shops, schools and salons.

6. It has further been averred in the plaint that the plaintiff, since starting her business in the early 1970's, has become a leader in the field of natural beauty and anti-aging treatments and introduced a totally new concept of "care and cure" and began to formulate her own Ayurvedic products "Shahnaz Herbal". It has next been averred in the plaint that the plaintiff has become known for her specialized clinical treatments and therapeutic products for specific problems like acne, pigmentation, scars and blemishes, skin-sensitivity, dandruff, hair loss and alopecia and heads a chain of over 400 franchise salons in India and abroad, popularizing the plaintiffs formidable range of nearly 350 products.

7. It has also been averred in the plaint that the plaintiff is a very well reputed name in the beauty business and has received numerous national and international awards, including the World's Greatest Woman Entrepreneur Award from the Success Group of U.S.A. and the plaintiff is the first woman to be so honored in the 107-year history of the Success awards.

8. Plaint also discloses that the plaintiff in the year 1997 introduced a skin radiance gel called "NATURE'S GOLD" range including the "NATURE'S GOLD SKIN RADIANCE GEL", "NATURE'S GOLD BEAUTIFYING MASK" etc which contains 24-carat pure gold, along with plant extracts and essential oils, with a built-in resistance against aging skin. It has also been averred in the plaint that the plaintiff is the proprietor of the trademark NATURE'S GOLD and is registered under No. 809031 in class 03 in favour of the Plaintiff. The products sold under the said trademark are used extensively and have come to be associated exclusively with the plaintiff.

9. It has further been averred in the plaint that the skin radiance gel of the plaintiff under its trademark NATURE'S GOLD is sold in a distinctive trade dress/ packaging with a unique color combination, get up, arrangement of features and lay out. The salient features of the said packaging are as under:

"(i) a square carton with a circular opening on the top panel and transparent rectangular openings on the side panels;

(ii) the words/marks "SHAHNAZ HUSAIN", "NATURE'S GOLD SKIN RADIANCE GEL" and "Moisturising Cream" appearing on the along of the circular opening;

(iii) Prominent display of "SHAHNAZ HUSAIN, NATURE'S GOLD SKIN RADIANCE GEL" on the opening flap of the carton;

(iv) A legend elucidating the unique components of the product and its purpose on the back flap of the carton."

10. It has next been averred in the plaint that product of the plaintiff is contained in a spherical container for the gel with a unique shape and features and the trade/dress packaging has a unique source indicator for the plaintiffs skin radiance gel under its trademark NATURE'S GOLD. The salient features of the said container are as under:

"(i) A spherical device in the middle with a flattened ring running along its circumference with a gold strip bearing the details of use and packaging of the product on one side and "SHAHNAZ HUSAIN" and "NATURE'S GOLD SKIN RADIANCE GEL" on the other side.

(ii) A division in the spherical device creating two separate compartments therein, in the ratio of 3: 1 consisting of the skin radiance gel and the moisturizing cream respectively."

11. It has also been averred in the plaint that the plaintiffs constant communication with consumers through advertisements and directly through the numerous Shahnaz Herbal franchise clinics all over the country the relevant class of consumers recognize the packaging of NATURE'S GOLD as emanating from the plaintiff and the essential features of the packaging, specifically the spherical container on which the trademark NATURE'S GOLD is represented on a unique flattened ring running along its circumference, and the distinctive division compartmentalizing the skin radiance gel and the moisturizing cream, has come to be associated with the plaintiff.

12. Plaint also discloses that due to the efficacy of the product under the trademark NATURE'S GOLD in conjunction with its distinctive packaging combined with the concerted efforts of the plaintiff and its licensee to promote the same, it has achieved substantial reputation and goodwill throughout India and the plaintiffs product under the trademark NATURE'S GOLD have gained immense popularity on account of the various articles that regularly appear in various newspapers, magazines etc. in addition to popularity that has been attained through word of mouth publicity.

13. It has also been averred in the plaint that the plaintiff also manages a website [www.shahnazhusain.com.my](http://www.shahnazhusain.com.my) which lists the plaintiffs various products including those under the trademark NATURE'S GOLD, their benefits etc. and the plaintiffs products can also be ordered online by consumers through this website.

14. A statement of sales turnover for the last three years is as under:

15. It has further been averred in the plaint that by virtue of prior adoption, prior registration and long, continuous and extensive use of the trademark NATURE'S GOLD throughout India and the packaging with its unique colour combination, get up, arrangement of features and lay out, the plaintiff has acquired tremendous goodwill and reputation and the plaintiffs product is trusted by millions of consumers all over the country.

16. It has also been averred in the plaint that the NATURE'S GOLD product has

come to be exclusively associated by the industry, trade and the shareholders with the plaintiff and they identify the packaging with the plaintiffs products. It has next been averred in the plaint that any unauthorized use of the plaintiffs trademark NATURE'S GOLD and or the combination of features including colour scheme, get up and lay out, amounts to violation of the plaintiffs statutory rights in the trademark and common law rights in the trade dress, and passing off of the unauthorized goods as those of the plaintiff.

17. Further as per the plaint the plaintiff in the month of February 2009 came across the impugned product being sold under the trademark HER EVER RUTH NATURAL GOLD at defendant No. 2's premises which appears to be a proprietorship concern dealing in cosmetics of the plaintiff as well as defendant No. 1 and defendant No. 1 appears to be a proprietorship concern engaged in manufacturing of cosmetic products including skin gel.

18. It has been averred in the plaint that the defendant's No. 1 mark NATURAL GOLD is deceptively similar to the plaintiffs registered trademark NATURE'S GOLD and the adoption of the said mark by the defendant No. 1 amounts to an infringement of the plaintiffs registered trademark under No. 809031.

19. It has further been averred in the plaint that the defendant's No. 1 packaging for its NATURAL GOLD product is a look-alike of the plaintiffs NATURE'S GOLD product and the products being sold by the defendants under the impugned trademark and packaging bear the most minute similarities to the packaging used by the plaintiff for its product-specifically, mustard colored text on the inside of the carton saying "SHAHNAZ AYURVEDICS" in case of the plaintiffs product and "HER EVER RUTH" in the case of the defendant's No. 1 impugned product in addition to the net weight of both products being 40 gm leading to passing off of the defendant's No. 1 product as that of the plaintiff. The similarities, in detail are thus compared in the table, as under:

20. It has also been averred in the plaint that by the use of the impugned packaging and trademark in respect of a product identical to that of the plaintiff, which is sold through identical trade channels and to the same class of customers, the defendant No. 1 is holding out its product to be a variant of, or associated with or approved by the plaintiff and such misrepresentation by the defendant No. 1 will inevitably cause confusion or deception in the mind of the purchasing public and members of trade, leading to passing off.

21. It has further been averred in the plaint that the defendant No. 1 has adopted the trade mark NATURAL GOLD and the impugned packaging in respect of their skin gel with a view to trade upon the immense goodwill and reputation that vests in the plaintiff by virtue of its extensive and uninterrupted use of the trade mark NATURE'S GOLD and the defendant No. 1 is trying to earn easy profits on the basis of the reputation built by the plaintiff.

22. Plaint also discloses that the product manufactured and marketed by the Defendants could also prove dangerous and hazardous to the health of the

consumers since it is a cosmetic product for application on the skin and may contain harmful chemical ingredients the effects of which are not known and unwary consumers may purchase and use the same believing that it is an Ayurvedic product manufactured or marketed by the plaintiff and such unauthorized use by the defendants would tarnish, degrade, or dilute the exclusivity and the distinctive quality of the plaintiffs well-known and world-renowned cosmetics and beauty products thereby causing irreparable loss and damage not just to the business of the plaintiff but also to its reputation and goodwill.

23. I have heard counsel for the plaintiff and carefully perused the documents which have been placed on record along with the plaint duly supported by affidavit which has been treated as affidavit by way of evidence on the averment of the counsel for the plaintiff. The evidence of plaintiff has gone unchallenged and unrebutted. Trademark registration certificate of the trademark "NATURE'S GOLD" in favour of plaintiff has been filed along with the plaint. Photographs of the plaintiffs skin radiance gel product and beautifying mask product under the trademark SHAHNAZ HUSAIN NATURE'S GOLD and photographs of the defendant No. 1 skin radiance gel product and beautifying mask product under the trademark HER EVER RUTH NATURAL GOLD have been placed on record. Newspaper articles and internet articles evidencing the repute of the plaintiffs products with the trademark NATURE'S GOLD have been filed along with the plaint.

24. On the basis of documents placed on record, plaintiff has been able to establish that plaintiff is the owner of the trademark NATURE'S GOLD and the plaintiff has an exclusive right to use the same. Plaintiff has also established that on account of huge amount spent on advertisements and promotion of "NATURE'S GOLD" products through newspapers, magazines and internet, plaintiff has been able to generate vast sales and the plaintiff has built up an unparallel reputation and goodwill with respect to its trademark "NATURE'S GOLD". Plaintiff has also established that the trademark "NATURE'S GOLD" is recognized and associated exclusively with the plaintiff only and no one else. Plaintiff has further established that the defendant No. 1 by adopting the mark "NATURAL GOLD" and impugned packaging in respect of identical products is causing infringement of rights in the trademark of plaintiff.

25. In a very recent judgment delivered by another bench of this court, The Indian Hotels Company Ltd. v. Ashwajeet Garg and Ors. CS(OS) 394/2012, decided on 01.05.2014, following observations were made: "

"23.....

39. In Kaviraj Pandit Durga Dutt Sharma Vs. Navaratna Pharmaceutical Laboratories, , the Hon''ble Apex Court in the following paras held as under: "In an action for infringement, the Plaintiff must, no doubt, make out that the use of the Defendant's mark is likely to deceive, but where the similarity between the

Plaintiffs and the Defendant's mark is so close either visually, phonetically or otherwise and the court reaches the conclusion that there is an imitation, no further evidence is required to establish that the Plaintiffs rights are violated. Expressed in another way, if the essential features of the trade mark of the Plaintiff have been adopted by the Defendant, the fact that the get-up, packing and other writing or marks on the goods or on the packets in which he offers his goods for sale show marked differences, or indicate clearly a trade origin different from that of the registered proprietor of the mark would be immaterial;..... When once the use by the Defendant of the mark which is claimed to infringe the Plaintiffs mark is shown to be "in the course of trade", the question whether there has been an infringement is to be decided by comparison of the two marks. Where the two marks are identical no further questions arise; for then the infringement is made out...."

26. In an another case of Evergreen Sweet House Vs. Ever Green and Others, , it was observed as under:

"15. A mark, is said to be deceptively similar to another (Section 2(1)(h), Trademarks Act, 1999) if it so nearly resembles that other mark as to be likely to deceive or cause confusion. Section 29(1) deals with a situation where the defendant uses a mark, which is identical or deceptively similar to that of the plaintiff, in respect of the same goods or services, and in such manner that it is likely that such use is taken as being an use as a trademark. This amounts to infringement. To fall within Section 29(1), the defendant's use of the mark must be so that it is likely that the public assumes that the said mark is used as a trademark. Section 29(2) deals with three situations; one where the defendants mark is identical to that of the plaintiff and in respect of similar goods. Two, where the marks are similar and in respect of goods which are identical or similar. Three, the marks as well as the goods are identical. Infringement does not take place if only one of the three ingredients are satisfied; the plaintiff has to prove that use by the defendant is likely to cause confusion on the part of the public or is likely to have an association with the registered mark."

27. In Corn Products Refining Co. Vs. Shangrila Food Products Ltd., the Supreme Court observed that the question whether two competing marks are so similar as to be likely to deceive or cause confusion is one of first impression and it is for the court to decide it. The question has to be approached from the point of view of a man of average intelligence and imperfect recollection.

28. In the case of Laxmikant V. Patel Vs. Chetanbhat Shah and Another, , Apex court made following observation:

"..... The law does not permit any one to carry on his business in such a way as would persuade the customers or clients in believing that his goods or services belonging to someone else are his or are associated therewith. It does not matter whether the latter person does so fraudulently or otherwise. The reasons are two. Firstly, honesty and fair play are, and ought to be, the basic

policies in the world of business. Secondly, when a person adopts or intends to adopt a name in connection with his business or services which already belongs to someone else it results in confusion and has propensity of diverting the customers and clients of someone else to himself and thereby resulting in injury."

29. Comparing both the marks and the similarities as detailed in para 18 aforegoing, I am of the view that the impugned trademark of defendant No. 1 "NATURAL GOLD" is deceptively similar to the plaintiff's trademark "NATURE'S GOLD". The use of the mark "NATURAL GOLD" by the defendant No. 1 along with similar packaging as that of plaintiff's in relation to identical goods is likely to dilute the distinctive character of the plaintiff's trademark "NATURE'S GOLD" and the same is likely to erode the goodwill and reputation of the plaintiff among its existing as well as potential customers in the market. The adoption and use of the identical and deceptively similar trademark along with the similar packaging in relation to identical products amounts to an infringement of the plaintiff's statutory rights in the registered trademark "NATURE'S GOLD". Furthermore, the defendant No. 1 in a malafide, dishonest and an unethical manner is encashing upon the goodwill and reputation of the plaintiff, established by the latter over the period of years.

30. Further, a clear cut case of passing off is established in view of dictum of Cadila Health Care Ltd. Vs. Cadila Pharmaceuticals Ltd., . Relevant portion of the judgment is reproduced below:

"The Supreme Court held that in a passing off action for deciding the question of deceptive similarity the following facts had to be taken into consideration:

- a) The nature of the marks i.e. whether the marks are word marks or label marks or composite marks, i.e. both words and label works.
- b) The degree of resemblance between the marks, phonetically similar and hence similar in idea.
- c) The nature of the goods in respect of which they are used as trade marks.
- d) The similarity in the nature, character and performance of the goods of the rival traders.
- e) The class of purchasers who are likely to buy the goods bearing the marks they require, on their education and intelligence and a degree of care they are likely to exercise in purchasing and/or using the goods.
- f) The mode of purchasing the goods or placing orders for the goods and
- g) Any other surrounding circumstances which may be relevant in the extent of dissimilarity between the competing marks."

31. The Defendant No. 1 has chosen not to contest the matter and thus the plaintiff is also entitled to the benefit of damages with a view to ensure that such litigants desist from indulging into such activities and they are not given benefit

of the acts, which resulted to the loss to the plaintiff. It would be useful to refer to the judgment in the case of Time Incorporated Vs. Lokesh Srivastava and Another, wherein this court has observed as under:

"This court has no hesitation on saying that the time has come when the courts dealing actions for infringement of trademarks, copyrights, patents etc. should not only grant compensatory damages but award punitive damages also with a view to discourage and dishearten law breakers who indulge in violations with impunity out of lust for money so that they realize 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".

32. For the reasons stated above, the plaintiff has made out a case for grant of decree as prayed in the plaint. Accordingly, the order dated 02.12.2014 is confirmed and the suit is decreed in favour of the plaintiff and against the defendant No. 1 in terms of prayer 25(i) and (ii) of the plaint. In addition thereto, the plaintiff would be entitled to damages to the tune of Rs. 2.00 lakhs.

33. Decree sheet be drawn up accordingly.