

(2014) 03 DEL CK 0143
In the Delhi High Court
Case No : CS (OS) 1493 of 2014

The Coca Cola Company and Another	APPELLANT
Vs	
Narsing Rao and Others	RESPONDENT

Date of Decision : 06-03-2014

Acts Referred:

Trade Marks Act, 1999 — Section 2

Citation : (2014) 4 AD 487 : (2014) 58 PTC 407

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Ekta Sarin, for the Appellant;

Judgement

Rajiv Sahai Endlaw, J.—The plaintiff has instituted this suit (on 29th July, 2013) claiming permanent injunction restraining the defendant from manufacturing or authorising the manufacture, selling or offering for sale, marketing, advertising, promoting, displaying or in any other manner whatsoever using the offending trademarks KELBY and/or KELBY Club Soda (label) and/or KELBY bottled water (label) and/or the offending bottle shape and/or any other mark which is deceptively or confusingly similar to the registered trademarks KINLEY Club Soda (label), KINLEY (label), KINLEY (word) and DANUBE Bottle shape of the Plaintiff No. 1, as a trademark or part of a trademark, trade name or part of a trade name or in any other manner whatsoever so as to infringe the Plaintiff No. 1's registered trademarks, and for ancillary reliefs of delivery, damages etc. The case of the plaintiff in the plaint is:

(I) that the Plaintiff No. 1 is one of the largest soft drinks companies in the world with operations in more than 200 countries. It is the owner and registered proprietor of several well-known trademarks inter alia Kinley, Coca Cola, Coke, Diet Coke, Minute Maid, Sprite, Fanta, Limca, Maaza, Powerade, Sunfill, Thums Up, Gold Spot, Crush and Rim Zim to name a few of them;

(II) that the Plaintiff No. 2 Hindustan Coca Cola Beverage Pvt. Ltd. is an

authorized bottler of Plaintiff No. 1, and is authorized to prepare, package, sell and distribute specified beverages under certain trademarks of Plaintiff no. 1 in Authorized Containers under the terms and conditions stipulated in Bottler's Agreement;

(III) that though the Plaintiff No. 1 is headquartered in Atlanta, Georgia, United States of America, it has local operations in over 200 countries of the world. Due to its immense reach, the various trademarks of the Plaintiff No. 1 have acquired immense reputation and goodwill in various countries of the world, including India;

(IV) that one of the most popular brands of the Plaintiff is KINLEY. The KINLEY brand is used by the Plaintiff's for two types of drinks, (a) high quality bottled water and (b) carbonated water with a wide array of variants: tonic, bitter lemon, club soda and fruit flavoured;

(V) that the distinctive DANUBE BOTTLE shape is used for KINLEY bottled water. The Plaintiff No. 1 first adopted the distinctive DANUBE BOTTLE shape in the year 2006 in Turkey for use in relation to bottled drinking water sold under its well-known trademark KINLEY. In India, the Plaintiff's commenced used of the DANUBE BOTTLE in the year 2008;

(VI) that the Plaintiffs have since the launch of the DANUBE BOTTLE used the same continuously and extensively, and as a result the DANUBE BOTTLE shape, has acquired immense reputation and goodwill and the consumers associate the said distinctive DANUBE BOTTLE shape with the Plaintiffs and the Plaintiffs brand KINLEY;

(VII) that the Plaintiffs also use the brand name KINLEY in relation to carbonated water and the same is marketed and sold in India as KINLEY CLUB SODA since 1998;

(VIII) that sometime in and around March, 2012, the plaintiffs came across the Defendant Nos. 1 and 2 Mr. Venkatesh's product namely carbonated water under the offending mark KELBY Club Soda; the defendant No. 3 Mohd. Naseer trading as M/s. Seema Aqua Minerals was found to be processing the water which was filled by defendants No. 1 & 2 trading as M/s. Hind marketing and M/s. Sridevi Marketing and defendant No. 4 Mr. B. Surendar Reddy sole proprietor of M/s. Sri Balaji Pet Polymers was supplying the infringing bottles;

(IX) that the Defendant Nos. 1 to 3 apart from using the mark KELBY which is confusingly and deceptively similar to the Plaintiff's well known trademark, KINLEY, have also copied the distinctive elements of the Plaintiff's KINLEY label;

(X) that the defendants like the plaintiffs have adopted a blue label, with a stylized depiction of a water source, on which it represents the mark KELBY in white block letters with a silver outline. The said defendants have also copied the exact shape, silver colour and placement of ribbon device as used by the plaintiffs below the mark KINLEY;

(XI) that a device in which "a product of The Coca-Cola Company" is written in the same colour combination of dark blue with white lettering has also been copied by the defendants by replacing the wording with "Packaged Drinking Water";

(XII) that the bottle in which the offending product KELBY bottled water is offered for sale is virtually identical to the Plaintiff's well known DANUBE BOTTLE shape which is used in relation to their brand KINLEY including the distinctive undulating lines along the upper and lower part of the bottle.

2. Summons of the suit and notice of the application for interim relief were issued and vide ex-parte ad-interim order dated 30th July, 2013, the defendants were restrained from using the same get up as then being used by them in respect of their mark KELBY.

3. Despite service, none appeared for the Defendants No. 1 to 4, accordingly on 15th February, 2014, the Defendants No. 1 to 4 were proceeded against ex-parte and the interim order granted on 30th July, 2013 was made absolute till the disposal of the suit.

4. On the same day i.e. 15th January, 2014 the counsels appearing on behalf of the plaintiff and defendant no. 5 Pramukh Packaging Pvt. Ltd., who were also stated to be supplying the infringing bottles to the defendants No. 1 & 2, stated that they are in the process of settling their dispute and were granted time to file a joint application. On the next date i.e. 28th February, 2014 defendant no. 5 handed over a copy of the undertaking which was taken on record stating that it would not manufacture, market, advertise or sell a bottle shape similar to the plaintiff's Danube Bottle shape. Accordingly, in view of the said undertaking and with the consent of the plaintiffs the defendant no. 5 was deleted from the array of the defendants.

5. The plaintiffs, despite having been granted sufficient time and opportunity, have failed to get their affidavits for leading ex-parte evidence on record. However, it is not deemed expedient to further await the same and allow this matter to languish, for the reason that I have in judgment dated 30th January, 2013 in CS (OS) No. 559/2010 titled Indian Performing Rights Society Vs. Gauhati Town Club held that where the defendant is ex parte and the material before the court is sufficient to allow the claim of the plaintiff, the time of the court should not be wasted in directing ex parte evidence to be recorded and which mostly is nothing but a repetition of the contents of the plaint.

6. I have thus, apart from examining the averments made by the plaintiffs in the plaint, as culled out above, also combed through the documents filed by the plaintiffs to support their case, in order to ascertain whether the plaintiffs are entitled to a decree forthwith.

7. The plaintiffs, in support of their claim have relied on the following documents:

(i) Representations of Plaintiff's KINLEY Club Soda (label), KINLEY (label),

KINLEY Club Soda Bottle and KINLEY Bottle;

(ii) Representations of Defendants impugned label for KELBY Club Soda, label for KELBY packaged drinking water, KELBY Club Soda Bottle and KELBY Packaged Drinking Water Bottle Shape;

(iii) Copy of the Trademark Registration Certificate No. 1682367 dated 30th April, 2008 with respect to KINLEY CLUB SODA label;

(iv) Copy of the Trademark Registration Certificate No. 1682368 dated 30th April, 2008 with respect to KINLEY label;

(v) Copy of the Trademark Registration Certificate No. 2097362 dated 09th February, 2011 with respect to Logo with Device;

(vi) Copy of the Trademark Registration Certificate No. dated 810322 dated 15th July, 1998 with respect to Device of KINLEY "CLUB SODA" (label);

(vii) Copy of the Trademark Registration Certificate No. 742535 dated 1st October, 1996 with respect to KINLEY CLUB SODA label.

8. The examination of the all the aforesaid unrebutted material leads to the inescapable conclusion that the defendants mark KELBY is confusingly and deceptively similar to KINLEY and the style of writing KELBY being virtually identical to the style of writing KINLEY; that the KELBY Club Soda (label) being virtually identical to the KINLEY Club Soda (label); and that the KELBY Club Soda being offered for sale in a bottle, the shape of which is virtually identical to the bottle used by the Plaintiff No. 1's for its product KINLEY Club Soda.

9. The Supreme Court as far back as in Parle Products (P) Ltd. Vs. J.P. and Co., Mysore, held that while comparing, only the broad and essential features are to be considered and it would be enough if the impugned mark/label bears such an overall similarity to the registered mark as would be likely to mislead a person usually dealing with one to accept the other if offered to him. The Supreme Court clarified that merely because the marks/labels upon being placed side by side are found to be different is no ground to hold the same to be not similar or dissimilar as an ordinary purchaser is not gifted with the powers of observation of a Sherlock Holmes. The law so laid down remains good after forty years also and was reiterated in Ramdev Food Products Pvt. Ltd. Vs. Arvindbhai Rambhai Patel and Others,

10. The Supreme Court in Cadila Health Care Ltd. Vs. Cadila Pharmaceuticals Ltd., supra has held that while applying the test of dissimilarity of the marks or the customer knowing about the distinguishing characteristics of the plaintiff's goods, the ground reality in India, of there being no single common language, a large percentage of population being illiterate and a small fraction of people knowing English cannot be lost sight of. It was further held that while examining such cases in India, what has to be kept in mind is that the purchaser of such goods in India who may have absolutely no knowledge of English language or of

the language in which the trademark is written and to whom different words with slight difference in spellings may sound phonetically the same has to be kept in mind. The test, the Supreme Court held which has to be applied is, whether the misrepresentation made by the defendant is of such a nature as is likely to cause an ordinary consumer to confuse one product for another due to similarity of marks and other surrounding factors. The Supreme Court in *Cadila Health Care Ltd. Vs. Shingra Food Products Ltd.*, laying down that English cases proceeding on the English way of pronouncing an English word by English men, which is not always the same, may not be of much assistance in our country in deciding questions of phonetic similarity. It was emphasized that English to the mass of Indian people is a foreign language.

11. The Division Bench of this Court in *United Biotech Pvt. Ltd. Vs. Orchid Chemicals and Pharmaceuticals Ltd and Others*, held that the test to be applied is of deceptive similarity and it is to be seen whether the two marks are structurally and phonetically similar and would cause deception in the mind of the consumer and upheld the removal of the trademark "FORZID" for the reason of the same being deceptively similar to the earlier registered trademark "ORZID", both in relation to pharmaceutical products.

12. I would also like to refer to the judgment dated 2nd May, 2011 of the Bombay High Court in Suit No. 3046/2010 titled *Gorbatschow Wodka KG Vs. John Distilleries Limited* wherein a similar question arose for consideration. The plaintiff in that case claimed that the shape of its bottles of Vodka was distinctive and formed an intrinsic part of its goodwill and reputation. The bottle which the defendant had adopted was alleged to be deceptively similar to that of the plaintiff. The plaintiff, on account of similarity in the shape of the bottles, claimed a dilution of the distinctive shape under which Vodka bottles of the plaintiff are marketed and sold, a dilution of the goodwill and reputation of the plaintiff in relation to the distinctive shape of the bottle, passing off at common law, unfair competition and a mushrooming effect in that unless the defendant were to be stopped other potential infringers may be emboldened to encroach upon the rights of the plaintiff. The defendant in that case had obtained registration of its shape under the Designs Act, 2000. The contention of the plaintiff was that registration under Designs Act was no defence to an action for passing off since there was no procedure in the Act for advertising and for receipt of oppositions. Granting injunction to the plaintiff, the Court, inter alia, observed as under:-

13. The action before the Court is a quia timet action which seeks to injunct the defendant from launching its product in India. The basis and foundation of the action is that the defendant has adopted a bottle for the sales of its product which in its shape bears a striking resemblance to the bottle of the plaintiff. Under the Trade Marks Act, 1999, the shape of goods is now statutorily recognized as being constituent element of a trade mark. Section 2 of the Trade Marks Act, 1999 defines the expression "trade mark" 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 to include the "shape of goods, their packaging and combination of colours". Parliament has, therefore, statutorily recognized that the shape in which goods are marketed, their packaging and combination of colours for part of what is described as the trade dress. A manufacturer who markets a product may assert the distinctive nature of the goods sold in terms of the unique shape through which the goods are offered for sale.

16.....The shape of the bottle which the plaintiff has adopted has no functional relationship with the nature of the product or the quality required of the container in which Vodka has to be sold. The shape, to use the language of a leading authority on the subject, is capricious. It is capricious in the sense that it is novel and originated in the ingenuity and imagination of the plaintiff.

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 a 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.

The aforesaid dicta of the Bombay High Court has been approved and followed by this Court in Zippo Manufacturing Company Vs. Anil Moolchandani and Others, and M/s Micolube India Limited Vs. Rakesh Kumar Trading as Saurabh Industries and Others,

13. On the basis of the averments made in the plaint and documents filed therewith and of which there is no rebuttal by the defendants as well as the case laws cited above, I am satisfied that the plaintiff has become entitled to the relief sought of injunction.

14. A decree is accordingly passed, in favour of the plaintiff and against the defendants in terms of prayer paragraphs (A) and (B) of the plaint. Plaintiff is also awarded costs of the suit. Counsel's fee assessed at Rs. 20,000/-. Decree sheet be drawn up.