

MANU/DE/1152/2004

Equivalent Citation: 2004(29)PTC537(Del)

IN THE HIGH COURT OF DELHI

CS (OS) No. 1476/2003

Decided On: 02.08.2004

Appellants: **Frito-Lay India and Ors.**

Vs.

Respondent: **Guru Prasad Enterprises**

Hon'ble Judges/Coram:

Mukul Mudgal, J.

Counsels:

For Appellant/Petitioner/plaintiff: Pratibha M. Singh and Anobha, Advs

Subject: Intellectual Property Rights

Acts/Rules/Orders:

Code of Civil Procedure (CPC) - Order 39 Rules 1, Code of Civil Procedure (CPC) - Order 39 Rules 2

Cases Referred:

Parle Products (P) Ltd. v. J.P. & Co., AIR 1972 SC 1359; Hygienic Research v. Shoban Lal, 94 (2001) DLT 209

Case Note:

Intellectual Property Rights – copyright – Order 39 Rules 1 and 2 of Code of Civil Procedure, 1908 – suit filed for permanent injunction restraining infringement of copyrights, passing off, acts of unfair competition etc – plaintiff had no objection to trademark of defendant – objection was with regard to colour imitation of packaging – averments of suit not denied by defendant – plaintiff entitled to succeed in suit.

ORDER

Mukul Mudgal, J.

1. This is the suit filed by the plaintiff for permanent injunction, restraining infringement of copyright, passing off, acts of unfair competition, damages, rendition of accounts, delivery up etc., in favor of the plaintiff and against the defendant.

2. plaintiff No. 1, Frito Lay India is a company established under the Indian Laws and a subsidiary of the plaintiff No. 3, Pepsi Co India Holding Limited, which is a subsidiary of plaintiff No. 2. plaintiffs are manufacturing Namkeens. i.e. 'Aloo Bhujia' under the mark 'Lehar' and other edibles in their distinctive packages, i.e. "Pudina Twist". "Navratan Mix" and "Moong Dal. plaintiffs have been manufacturing and marketing snack products and beverages also. Similarly the plaintiffs have also adopted an innovative style for the "Moong Dal" and the "Navratan Mix" range of its products which is an original artistic work under the Copyright Act, 1957.

3. The gravamen and grievance of the plaintiffs is that the defendants have based its packaging entirely on its packaging so as to convey an impression to the purchasing public that the defendant's product are that of the plaintiffs. The common features between the plaintiffs and the defendant's products are detailed as under:-

"plaintiff's product

Defendant's product

A Word 'NEW is written in the left side at the top of the packaging

A Word 'New' is written in the left side at the top of the packaging

Lehar
Namkeen

Mannka
= Namkeen =

Aloo Bhujia

Aloo Bhujia

Pudina Twist

Pudina Taste

Checked (brown & yellow striped) napkin in a folded manner kept in the red circle

Broad checked (green & white) napkin spread in the back ground of the red circle

"Kya Karein Control Nahin Hota!"

Jab Dil ho Udas
Maange Kuch Khaas
MAANKA NAMKEEN DE
NAYA SWAD KA AAHSAAS

The packaging is a cylindrical figure in red colour with a circle base within the circular base, the photograph of three bowls; one with Bhujia on which the neem leaf is shown; next to the bowl with the Bhujia, there are two smaller bowls containing with namkeen to give pudina effect, neem leafs also shown outside the bowls.

The packaging is a cylindrical figure in red colour with a circle base within the circular base. The photograph of three bowls; one with Bhujia on which the neem leaf is shown; next to the bowl the Bhujia, there are two smaller bowls containing with namkeen to give pudina effect, neem leafs shown outside bowls.

Two sides of the cylinder have an artistic motif in red and yellow with four shape device for being part of the motif
The word 'New' appears on the left hand corner on one side of the cylinder
'Lehar' namkeen Alu Bhujia
The writing of the word is in white letters and blue and yellow outlining
The words 'Pudina Twist' appear at the edge of the circular base.

Two sides of the cylinder have an artistic motif in red and yellow with flour shape device for being part of the motif
The word 'New' appears on the left corner on one side of the cylinder
Maana namkeen Alu Bhujia
The writing of the word is in white letters and blue and yellow outlining.
The words 'Pudina Taste' appear at the edge of the circular base.

Colour combination consists of yellow, red, green, blue

Colour combination consists of yellow, red, green, blue

Around the Cylinder feature Bhujia is shown strewn all around the packaging

Around the Cylinder feature Bhujia is shown strewn all around the packaging"

4. The plaintiffs have averred that it has expended more than a sum of Rs. 11 crores on the advertisement till July, 2003. The plaintiffs have averred that the use of its packaging by the defendant which is a substantial reproduction and the colour imitation of its packaging constitutes infringement of copyright, passing off, act of unfair competition and dilution. The defendants were served by substituted service and by way of affixation at their address. In spite of the service, neither the defendant put in appearance nor filed the written statement/reply. Accordingly, by Order dated 3rd February, 2004, the suit was proceeded ex-parte against the defendant and a temporary injunction was also granted in favor of the plaintiff and against the defendant till the disposal of the suit. Evidence by way of affidavit of Shri V.R. Shankar has been filed on behalf of the plaintiffs. Original documents have also been filed inclusive the plaintiff's sample products as well as the defendant's products which are as follows:

"Ex. P-1 Authorization in favor of Mr. V.R. Shankar.

Ex. P-2 Letter dated 31th May, 2000.

Ex. P-3 Sample of plaintiff's Aloo Bhujia.

Ex. P-4 Sample of Excise Invoices cum-Delivery Challans.

Ex. P-5 Story Board of companies' advertisements.

Ex. P-6 Advertisements released and publicity material.

Ex. P-7 Sample of Guru Prasad Enterprises' Aloo Bhujia.

Ex. P-8 Sample of Packaging of plaintiffs/defendants qua 'Navratan Mix'.

Ex. P-9 Sample of Packagings of plaintiffs/defendants qua 'Moong Dal'.

Ex. P-10 Original copy of the Local Commissioner's Report dated 5th August, 2003.

Ex. P-11 Copy of publication of order/notice dated 11th January, 2004 in the 'Statesmen' newspaper.

"It is Therefore, clear that in order to come to the conclusion whether one mark is deceptively similar to another, the broad and essential features of the two are to be considered. They should not be placed side by side to find out if there are any differences in the design and if so, whether they are of such character as to prevent one design from being mistaken for the other. It would be enough if the impugned mark 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 offer to him. In this case we find that the packets are practically of the same size, the colour scheme of the two wrappers is almost the same; the design on both though not identical bears such a close resemblance that one can easily be mistaken for the other. The essential features of both are that there is a girl with one arm raised and carrying something in the other with, a cow or cows near her and hens or chickens in the foreground. In the background there is a farm house with a fence. The words "Gluko Biscuits" in one and "Glucose Biscuits" on the other occupy a prominent place at the top with a good deal of similarity between the two writings. Anyone in our opinion who has a look at one of the packets today may easily mistake the other if shown on another day as being the same article which he had seen before. If one was not careful enough to note the peculiar features of the wrapper on the plaintiffs' goods, he might easily mistake the defendants' wrapper for the plaintiffs'. After all, an ordinary purchaser is not gifted with the powers of observation of a Sherlock Holmes. We have Therefore to doubt that defendants' wrapper is deceptively similar to the plaintiffs' which was registered. We do not think it necessary to refer to the decisions referred to at the Bar as in our view each case will have to be judged on its own features and it would be of no use to note on how many points there was similarity and in how many others there was absence of it."

6. The position of law laid down in Hygienic Research's case (supra) reads as follows:-

"From the evidence on record I am satisfied that the plaintiff is the owner of the artistic work on the carton or its product SUPER VASMOL 33 in the manner. It is project in Exh. P1. I am also satisfied that the defendants in their product hair dye-SUPER-99 Black and nice has copied this artistic work of the plaintiff inasmuch as it contains same colour scheme, get up, look up and arrangement as SUPER VASMOL-33, by placing the picture of a man and woman on the same side of the carton as that of the plaintiff's product, the defendants have also copied the entire descriptive matter on the carton. Even the descriptive matter in Hindi and English is placed on the same place using the same type, style as that of the plaintiff's carton. The defendants have also copied the rectangular device as that of the plaintiffs. This action of the defendant is clearly dishonest and mala fide and it is bound to cause confusion and deception in the minds of the consumers/purchasers. By using this methodology the defendants' intention is to passing of their goods as goods of the plaintiff. Issue Nos. 1 and 2 are Therefore, decided in favor of the plaintiff and against the defendants."

7. The learned counsel for the plaintiff has made it clear that she has no objection to the trademarks of the defendant but she has objected to the colour imitation of its packaging. The averments of the suit have not been denied by the defendant. Since there is no rebuttal of the averments made in the plaint, the plaintiff is entitled to succeed in the suit.

8. Accordingly, a decree of permanent injunction is passed, restraining the defendants, its principal officers, family members, stockists, servants, agents, and anyone acting for and on its behalf from using the Mannka aloo Bhujia'. 'Mannka Navrattan Mix' and 'Mannka Moong Dal' packaging, annexed with the present suit with similar expressions or any other packaging/expressions which is a substantial reproduction or colourable imitation of the plaintiffs' packaging/expressions, in relation to snack food products in any manner whatsoever, so as to constitute infringement of the plaintiffs' copyright. A decree of permanent injunction is also passed, restraining the defendant, its principal officers, family members, stockists, servants, agents, and anyone acting for and on its behalf from using the packing, labels under the trade mark 'Mannka Aloo Bhujia'. 'Mannka Navrattan Mix' and 'Mannka Moong Dal' packaging which is deceptively similar to the plaintiffs' 'Lehar aloo Bhujia'. 'Lehar Navrattan Mix' and 'Lehar Moong Dal' packagings and from doing any other act as may constitute confusion and deception, resulting in passing off the plaintiffs from indulging in acts of unfair competition and further from diluting the brands, labels, packagings of the plaintiffs.

9. Suit stands allowed and disposed of accordingly with no order as to costs.