

Hector Beverages Private Limited vs. Global Food & Beverages Company

CS (Comm) No.273/2019

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Company

21.11.2019

Present: None.

Suit is for permanent and mandatory injunction, damages on account of piracy of design and infringement of copyright together with other reliefs, filed by the plaintiff, on the premise that the plaintiff is a registered owner of the design and other intellectual property rights vested in the product - **"PAPER BOAT"**. Plaintiff is claimed to a company duly registered, engaged in the manufacture and sale of fruit juices, fruit based beverages and other allied products. Plaintiff is stated to have commenced its business and operation in the year 2009 and to have launched / introduced energy drinks and fruit based beverages under the name and style of **"PAPER BOAT"** & **"TZINGA"** energy drinks. In so far as the products/ mark/ design in question is concerned, it is averred that the plaintiff had developed and adopted the trademark **"PAPER BOAT"** in relation with its range of juices and has also devised a unique trade-dress, with a unique design of packaging of the products in relation with the range of juices so introduced by the plaintiff in the year 2012. It is stated that the product of the plaintiff, under the name & style of **"PAPER BOAT"** are being marketed and sold widely in markets all over the country, and had acquired an enviable reputation. The range

of the products of the plaintiff, being traded under the name and style of **“PAPER BOAT”** are graphically presented in para-9 of the plaint.

The plaintiff has also averred that it has been spending considerable amount towards the promotion and advertisement of its products, and the defendant, it transpired to the plaintiff, has not only dishonestly adopted the design devised by the plaintiff but also has adopted the colour scheme in relation with its products which are similar to the products being manufactured and sold under the brand name **“PAPER BOAT”** and **“SWING”**.

The plaintiff, accordingly, has sought injunction restraining the defendant from manufacturing, selling and marketing its goods using the trade-dress as well as the design of the packaging so devised and adopted by the plaintiff in relation with its products being sold under the brand name **“PAPER BOAT”** and **“SWING”**.

An application under Order XXXIX Rule 1 & 2 of the Code of Civil Procedure, 1908 for exparte ad interim injunction as well has been filed seeking injunction orders against the defendant from using the trade-dress, colour combination and the design as well as the other intellectual property rights vested with the plaintiff.

I have heard the Learned counsel for the plaintiff and have gone through the relevant records.

Plaintiff had also produced the original products being manufactured by the plaintiff, and those being manufacture by the defendant.

It is submitted by the Learned counsel for the plaintiff that the defendant, as apparent from the products of the defendant, has not only adopted the colour scheme but the placement of text, the

design of the trade-dress/ packaging but also the defendant is using the same for the purpose of similar products as being manufactured and sold by the plaintiff. He contends that in case the product of the defendant is examined on the Triple Identity Test, it would become clear that the adoption and use by the defendant is actionable, in as much as, the same by all means cannot be treated as genuine and bonafide adoption or use. He has further contended that the plaintiff is not only the prior user but also is the registered for the purpose of its design, while inviting the attention of the court towards the certificate placed on record at page No.43 and page No.50 of the document filed along with the plaint.

The plaintiff has further contended that the plaintiff is vary of the fact that the defendant might circulate its products in the market within the territorial jurisdiction of this Court and has also relied on the following judgments:

- 1. Carlsberg Breweries A/S vs. Som Distilleries and Breweries Ltd.** CS (Comm) 690/2018 & I. A. 11166/2018;
- 2. Allied Blenders & Distilleries Pvt Ltd. vs. R. K. Distilleries Pvt Ltd.** FAO (OS) No.251/2016, CM Nos.30421, 30422 and 30423/2016; and
- 3. RSPL Limited vs. Mukesh Sharma & Ors** FAO (OS) 145/2016.

In **Allied Blenders & Distilleries Pvt Ltd. vs. R. K. Distilleries Pvt Ltd.**, The Hon'ble High Court has observed as under:

“11. Pfizer Products (supra) was, of court, a decision rendered by one of under Section (Badar Durrez Ahmed) as a single Judge, wherein the following observation was made:-

“12. The other aspect of the matter is that a threat of selling the

*offending goods in Delhi would in itself confer jurisdiction in the courts in Delhi to entertain a suit claiming an injunction in respect thereof. Whether the threat perception is justified or not is another matter which has to be considered and decided upon in the application filed by the plaintiff under Order 39 Rules 1 and 2 or on merits when the suit is taken up for disposal. Insofar as Order 7 Rule 10 is concerned, assuming that whatever is stated in the plaint is correct, one would have to also assume that the threat or the intention of the defendants to sell and offer for sale the offending goods in Delhi is also correct. Therefore, if the threat exists then this court would certainly have jurisdiction to entertain the present suit.*

*In these circumstances, this application is dismissed. No order as to costs."*

12. These observations are clearly in line with the observations of the Division Bench in *Teva Pharmaceutical Industries Limited* (supra). What is important is that the threat of selling the goods under the impugned trade mark in Delhi would by itself confer jurisdiction on the courts in Delhi. It is another matter that the threat perception would have to be justified, *prima facie*, when the application filed by the plaintiff under Order XXXIX Rules 1 & 2, CPC would be considered or later, on merits, when the suit itself is taken up for disposal. However, in a consideration under Order VII Rule 10 CPC, the court must proceed on the assumption that whatever is stated in the plaint is correct and , therefore, it would also have to assume that the threat perception or the apprehension on the part of the plaintiff as stated in the plaint is also correct. That in itself would amount to a part of the cause of action.

13. In *Win Plast Limited* (supra), which was a Division Bench decision of the High Court of Gujarat, the following observations are notable:-

"24. In the facts of the case, admittedly, the appellant-original defendant had been marketing the product for which some vouchers or invoices are placed that it has launched the product at Bhopal and other places. Therefore, the apprehension that it is likely to be launched in Ahmedabad, Gujarat, coupled with the fact that there is a distributor appointed, sufficiently justify the apprehension for *quia-timet* action. It is well-accepted that for the purpose of *quia-timet* action it is not necessary that there should be an actual piracy or infringement. In this very judgment, referring to the Division Bench of the Bombay High Court, it has been quoted,

".....Section 20 of the Code of Civil Procedure shows that a suit like the present can be filed wherever the cause of action wholly or partly arises. The plaintiff has prayed for an injunction regarding a threatened breach of a registered trade mark. The learned single Judge held that the Delhi Court does not have jurisdiction on the ground of any sale having been made in Delhi,

*but does have jurisdiction on account of the advertisement having appeared in the Trade Mark Journal. The real point which gives the court jurisdiction is not the place where the advertisement has appeared, but the fact that the trade mark is sought for sale in Delhi amongst other places. Furthermore, when an injunction is sought, it is not necessary that the threat should have become a reality before the injunction (sin may be granted) and it can even be sought for a threat that is still to materialize."*

*25. Thus, it is not the actual marketing or launching of the product or sale of the product, but reasonable apprehension for the infringement or piracy or passing off which would be sufficient."*

I have gone through the relevant records.

A prima facie case exists in favour of the plaintiff. The registration of the design, the prior user and the reputation of the plaintiff would clearly indicate that the plaintiff would suffer in terms of the hardship in case the defendant is not enjoined. Balance of convenience also tilts in favour of the plaintiff, being prior user as well as the registered owner of the design. Accordingly, defendant is, accordingly, hereby restrained/ enjoined from using the design/ shape of the packaging as well as the cap of the pouch, which are subject matter of registration No.268096 dated 10.12.2014 and No.277817 dated 24.11.2015 in favour of the plaintiff.

Defendant is, further, restrained from marketing or selling or otherwise circulating the said products till the next date of hearing.

Plaintiff is directed to comply with the provisions of Order XXXIX Rule 3 of the Code of Civil Procedure, 1908 within 10 working days from today.

Summons of the suit and notice of the application under Order XXXIX Rule 1 & 2 of the Code of Civil Procedure, 1908 be issued to the defendant on filing of PF and RC, returnable on

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07.01.2020. Copy of this order be given dasti to Learned counsel for the plaintiff.

(NIKHIL CHOPRA)  
ADJ-02/SOUTH  
SAKET/NEW DELHI  
21.11.2019