

Bajaj Resources Private Limited & Anr vs Pioneer Herbals & Ors on 11 May, 2022

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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CS (COMM) 311/2022

BAJAJ RESOURCES PRIVATE LIMITED & ANR. Plaintiffs

Through: Ms. Geetanjali Visvanathan, Ms.

Kruttika Vijay and Mr. Sauhard

Alung, Advocates.

versus

PIONEER HERBALS & ORS. Defendants

Through: Mr. Sai Krishna, Advocate with Mr.

Jaspreet Singh Kapur, Mr. Manu A.

Bhardwaj and Mr. Vivek Ayyagari,

Advocates.

CORAM:

JUSTICE PRATHIBA M. SINGH

ORDER

% 11.05.2022

1. This hearing has been done through hybrid mode.

2. The caveator has appeared and accepted notice. The caveat is discharged.

I.A.7381/2022 (for exemption)

3. This is an application seeking exemption from filing certified/cleared/typed or translated copies of documents. Allowed, subject to all just exceptions. I.A.7381/2022 is disposed of. I.A. 7382/2022 (u/S 12A)

4. This is an application seeking exemption from instituting pre- litigation mediation. In view of the orders passed in CS (COMM) 132/2022 titled Upgrad Education v. Intellipaate Software, the I.A. 7382/2022 is allowed and disposed of.

I.A. 7383/2022 (additional documents)

5. This is an application seeking leave to file additional documents under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (hereinafter, 'Commercial Courts Act'). Ld. counsel for the Plaintiffs submits that the Legal Proceeding Certificates of the trade mark registrations are not available with the Plaintiff. Accordingly, the Plaintiffs are permitted to file the same in Court in terms of the timelines prescribed in the Commercial Courts Act, 2015, as soon as the same are issued by the Trade Mark Registry.

6. I.A. 7383/2022 is disposed of.

I.A.7380/2022 (u/O XXXIX Rules 1 & 2 CPC)

7. This is a suit filed by the Plaintiffs for permanent injunction restraining infringement of trade mark, trade dress, passing off, dilution and tarnishment, damages, rendition of accounts, etc. The present suit has been filed by the Plaintiffs i.e., Bajaj Resources Private Limited- Plaintiff No.1, and Bajaj Consumer Care Limited- Plaintiff No.2 against the Defendants i.e., Pioneer Herbals- Defendant No.1, Pioneer International- Defendant No.2 and the promoters/proprietors of Defendant No.1 & 2. The case of the Plaintiffs is that they are one of the leading players in the hair oil category in India and have various products which they have manufactured and sold over the years. The said products are Bajaj Almond Drops Hair Oil, Bajaj Brahmi Amla Hair Oil, Bajaj Amla Hair Oil, Bajaj Jasmine Hair Oil, etc. The Plaintiffs' flagship product is "Bajaj Almond Drops" hair oil, which according to the Plaintiffs, is sold in India and in several other foreign countries.

8. According to the Plaintiffs, the Plaintiff's predecessor Bajaj Sevashram Limited adopted a distinctive label for the "Bajaj Sevashram Almond Drops" in the year 1989, which was designed by one of the employees in the course of employment. Therefore, the rights in the said label and container belong to the Plaintiffs. It is the case of the Plaintiffs that the said label has been used continuously and extensively by the Plaintiffs since 1989. The Plaintiffs' state that the said label serves as a source identifier for the Plaintiffs' product owing to enormous reputation and goodwill generated over time.

9. The Plaintiffs applied for registration of the label along with the bottle/container in May, 2007 as a trade mark bearing application no. 1560098. The said trade dress containing the unique shape of the container, the brown colour cap along with the 'U' shape label, with the words "Bajaj Almond Drops" written with droplets replacing the letter 'O', is a registered mark since 2007. The user claimed in the said registered trademark is of 1st January, 1989. The said mark of the Plaintiffs' is as under:

10. Ld. counsel for the Plaintiffs submits that the said trade dress, colour combination, distinctive container, label and various artistic features on the said label may have been modified slightly from time to time, however, the broad features have remained constant over time and are distinctively associated with the Plaintiffs. The Plaintiffs have also filed applications and obtained registrations for various variants of this label and container as well. The trademark "Bajaj Almond Drops" is also

registered in several foreign countries. According to the Plaintiffs, the "Bajaj Almond Drops" hair oil container, label, and artistic work are exclusively associated with the Plaintiffs. The sales figures of the hair oil sold by the Plaintiffs under the mark "Bajaj Almond Drops" for the last financial year is over Rs.840 crores in 2020-21 with the advertisement expenditure of approximately Rs.55 crores in the same period. The Plaintiffs also own the domain name www.bajajalmonddrops.in and have accounts on Facebook and other social media platforms wherein their product is promoted and advertised. In the plaint, the Plaintiffs have also listed various other suits which the Plaintiffs have filed seeking protection in respect of this very product.

11. The grievance of the Plaintiffs in the present suit is that the Defendants have adopted the infringing "Pioneer Almond Care" label and container for its non-sticky hair oil, the trade dress of which is almost identical to the trade dress of Plaintiffs' product. Ld. counsel for the Plaintiffs points out that the Defendants have trademark registrations bearing no. 1697563 for a label, which is completely different from what the Defendants are currently using. It is her submission that the Defendants have instead of using the applied mark, chosen to adopt the label, trade dress, colour combination, container shape etc. which is a substantial imitation of the Plaintiffs' mark. The registered trademark of the Defendants is as depicted below:

12. It is also pointed out by Ld. Counsel for the Plaintiffs that a different container was being used by the Defendants earlier as per the promotional video of the Defendants' product where the shape of the bottle, label and other artistic features were entirely different. However, the Defendants have consciously and deliberately chosen to adopt the impugned infringing container, label and trade dress.

13. Mr. Sai Krishna, Ld. Counsel appearing for the Defendants submits that the cause of action had arisen in June, 2021 when a cease-and-desist notice was issued by the Plaintiffs calling upon the Defendants to immediately desist from using the impugned container and label. However, it is his submission that the products of the Defendants with the impugned trade dress have been available in the market since 2013. He submits that the products of the Plaintiff and Defendants have co-existed in the market for the last several years, and therefore, the present is not a fit case for grant of an injunction. Further, he disputes the averments made by the Plaintiff that earlier the Defendants were using a different container/label.

14. Issue notice. Ms. Jaspreet Kapur, Ld. Counsel accepts notice on behalf of the Defendants.

15. The Court has heard the submissions of the Ld. counsels and has also perused the physical products, which have been produced before the Court. A comparative chart of the products of the Plaintiffs and Defendants has been laid out in the plaint, which is reproduced hereinunder:

16. A perusal of the physical products shows that broadly, the features of the container, the colour combination, the artistic features including the droplet in the word 'Almond' instead of 'O', inverted 'U' shape label etc. are similar to that of the Plaintiffs' trade dress. The Plaintiffs' trade dress itself is a registered trademark and is, thus, entitled to protection. The Defendants' products are nothing but a substantial and colourable imitation of the Plaintiffs' mark. It is the settled position in law that

when comparing products of this nature especially, which are consumer goods, the Court is not to compare the differences, but to see the overall get up, trade dress and the look and feel of the products. In Parle Products (P) Ltd. v. J.P. and Co., Mysore AIR 1972 SC 1359 the Supreme Court has held that in order to examine whether one mark is deceptively similar to another, the broad and essential features of the two are to be considered and they should not be placed side by side to find if there are any differences. The observations of the Court are as under:

"9. 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 offered 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 word "Glucose 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 to-day 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' if shown to him some time after he had seen the plaintiffs'. After all, an ordinary purchaser is not gifted with the powers of observation of a Sherlock Holmes. We have therefore no doubt that the 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."

17. The said position has been reiterated in Seven Towers Ltd. v. Kiddiland and Ors. 2016 (68) PTC 308 (Del) in which it was observed as under:

"47. The arguments of the defendants are that no exclusivity can be claimed in basic colors or the color black which forms the border/cage. The said submissions have no force as the plaintiffs are not seeking protection in any single feature but in the combination of all these features which constitutes the get up of a product namely the combination of shape/size/color-combination/black border of the squares etc.

48. There is also no force in the submission with regard to black grid not being distinctive. The main question being considered was whether the trade dress is

inherently distinctive. In order to compare the two products with regard to trade dress, the overall look and appearance of the products and general "impression & idea" left in the mind by the consumer is to be kept in the mind."

18. In view of the facts of the present case and the above legal position, this Court is prima facie of the opinion that if the Plaintiffs' and the Defendants' products are stocked together in any shop or retail outlet, there is a clear likelihood of the Defendants' product being associated or connected with the Plaintiffs or confused with the Plaintiffs' products. Under these circumstances, the Court was inclined to pass an injunction order, however, Id. Counsel for the Defendants submits that he wishes to seek instructions from his client as to whether the Defendants would be willing to change to a non-infringing label, container with a different trade dress as also in respect of stocks of the infringing products that are available with the Defendants.

19. Considering the fact that the case of the Defendants is that they have been using these containers and labels since 2013, this Court is inclined to grant time to the Defendants to revert with instructions as to the time that may be required for changing over from using the containers with the impugned trade dress as also for producing the stock statement of the existing stocks of the products of the Defendants packed in the impugned containers/bottles.

20. List on 20th May, 2022.

PRATHIBA M. SINGH, J.

MAY 11, 2022/dk/sk