

Modicare Limited vs Maa Adishakti Multi Trade Enterprises & ... on 13 October, 2023

Author: Prathiba M. Singh

Bench: Prathiba M. Singh

\$~2

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 13th

+

CS(COMM) 532/2019, I.A. 13298/2019 & 1515/2023

MODICARE LIMITED

..... P

Through:

Ms Akanksha Singh, Advoca
9811045646).

versus

MAA ADISHAKTI MULTI TRADE

ENTERPRISES & ORS.

.....

Through: None.

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

1. This hearing has been done through hybrid mode.

2. The Plaintiff- Modicare Ltd. has filed the present suit against four Defendants- Defendant No. 1-Maa Adishakti Multi Trade Enterprises, Defendant No. 2-Mr. Sibhu Ram Sahu, Defendant No.3-Hawaiian Herbals and Defendant No. 4-Tonga Herbs Ltd.

3. The Plaintiff's case is that it manufactures, markets and sells a large number of FMCG products, including food processing products, agricultural chemicals, personal care, nutraceuticals and health care products.

4. The Plaintiff is part of the K.K. Modi Group, one of India's leading conglomerates, which includes ventures like 24Seven Convenience Stores. It is a direct selling company which conducts its business through Modicare consultants, and engages in sale of products related to health, nutrition, skincare, etc., The Plaintiff claims to be having more than 196 support centres, and 865 SKUs and 3,80,000 active Modicare consultants.

5. The Plaintiff's grievance is that one of the well-known marks of the Plaintiff is the mark 'WELL' which was adopted by it in 2004 along with a mark 'MODICARE'. Further, a series of 'WELL' marks is used by the Plaintiff for its FMCG products, as set out in paragraph 13 of the plaint and is as under (hereinafter, 'Plaintiff's products'):

MODICARE WELL INTELLECTE, MODICARE WELL NATUROPAUSE, MODICARE WELL AM, MODICARE WELL PM, MODICARE WELL JOINT EASE, MODICARE WELL STRONG & SMART, MODICARE WELL RED GINSENG TABLETS, MODICARE WELL NONI JUICE CONCENTRATE, MODICARE WELL CALCIUM COMPLEX, MODICARE WELL, MODICARE WELL D-TOX, MODICARE WELL CARDIO ACT, MODICARE WELL PROTEIN NOURISHER, MODICARE WELL PROTEIN CREST VELVET CHOCOLATE"

6. The details of registrations of the trademarks of the Plaintiff are set out in paragraph 17 of the plaint and the same are extracted below:

Application/ Registration No.	Date of Application	Mark	
2495478	March 14, 2013		
2302717	March 20, 2012		Registered
2314532	April 12, 2012		Registered
1093799	April 9, 2002	WELLNESS	Examination Report Issued
1093804	April 9, 2002	WELLNESS	Registered
1093807	April 9, 2002	WELLNESS	Objected
1257180	December 24, 2003	MODICARE WELL	Registered
1257181	December 24, 2003	MODICARE WELL	Registered
2063835	December 6, 2010	MODICARE WELLNESS	Registered
2220731	October 17,		Registered

2220732	October 17,		Regi
2255900	December 23, 2011	MODICARE WELL D-TOX	Registered
2289615	February 27,		Registered
2302713	March 20, 2012	MODICARE WELL	Registered
3205630	January 07,		Registered
3205630	March 08, 2016	WELL KIDS	Objected
3205632	March 08, 2016	MODICARE WELL KIDS	Objected
3341089	August 19,	WELL FREEDOM	Objected

7. Insofar as 'WELL' word mark is concerned, it was filed for trade mark registration in 2002 but has been objected to and has not been registered till now.

8. The Plaintiff claims rights in the 'WELL' series of marks, including the sub-brands and asserts goodwill in them due to their long and continuous use. The plaintiff avers that the Plaintiff's products with the WELL marks have certifications from prominent agencies such as USDANOP, USA, Naturland Organic, Germany, and Ecocert Organic Standards, France. Additionally, it is stated that the Plaintiff holds an ISO 9001:2015 certification from Bureau Veritas. The Plaintiff claims that its products are developed by skilled technical teams with rigorous quality control, ensuring top quality by using the best raw materials, like Korea Insam Ginseng in their 'WELL RED GINSENG' tablets.

9. The Plaintiff also has licenses from the FSSAI, Ministry of Health and Family Welfare, which mandate strict quality checks, ensuring that the products are safe for public consumption and comply with the Food Safety and Standards Act, 2006. These licenses have been produced in the documents annexed to the plaintiff.

10. The Plaintiff avers that it has crafted a unique trade dress with distinct elements for each of the

WELL marks, making its products easily recognizable with a strong recall value. It is stated that the Plaintiff recently updated the trade dress for some products. However, the plaintiff avers that the original cause of action remains as the products with the old trade dress are still available in the market, and the registration for the old trade dress is still valid.

11. The sales figures placed on record show that the total sales of 'WELL' branded products are over Rs.212 crores in 2018-2019. The plaintiff avers that the sales figures for the Plaintiff's products have shown a consistent increase over the six-year period, which demonstrates the Plaintiff's market presence.

12. It is also stated that the characteristics of the labels adopted by the Plaintiff for the products sold under the WELL marks including the get up, lay out, color palate etc. constitute artistic works under the Copyright Act, 1957.

13. Defendant No.1-Maa Adishakti Multi Trade Enterprises is claimed to market the infringing product line. Defendant No. 2-Sibhu Ram Sahoo, is stated to be the founder of this entity. Hawaiian Herbals, or Defendant No. 3, is allegedly a partner of Defendant No.1. Meanwhile, Defendant No. 4-Tonga Herbs Ltd., is also connected to Defendant No.1 (hereinafter, 'the Defendants').

14. The Plaintiff is aggrieved by the Defendant's use of the following marks/brand names:

WELL INTELLECTE, WELL KOREAN RED GINSENG, WELL D-TOX, WELL JOINT-EASE, WELL AM-PM and, WELL NATUROPAUSE The above marks are used by the Plaintiff, and claimed to have been identically copied by the Defendants.

15. A comparative chart of the Defendants and the Plaintiff's products is set out below:

S. Defendant's Product Plaintiff's Product Registration Status No No.

1. 2302717 Valid and subsisting
2. 2495478 Valid and subsisting
3. 2314530 Lapsed
4. passing off
5. passing off
6. 2314532 Valid and subsisting
7. SCI-VEDIC 1263144 Valid and subsisting

8. passing off

9. 2255900 MODICARE WELL D-TOX

16. The plaintiff avers that in July, 2019, the Plaintiff discovered the Defendants' products on various online portals such as Amazon.in, Shopclues.com and Snapdeal.com. The Defendant No. 1 is the marketing entity of the product along with Defendant Nos. 4 and 3. Defendant No.2 is the founder of Defendant No.1. These Defendants are jointly manufacturing, offering for sale the Plaintiff's products on various online platforms.

17. The investigation conducted by the Plaintiff also revealed that the Defendants were connected to each other and that the Defendant No. 1 had a website namely www.miraclesforu.org. It was further revealed to the Plaintiff that the products with the name and address of Defendant No. 1 were replaced by that of Defendant No. 4. However, it is averred that the said products originate from the same source, Defendant No. 1. Evidence is provided in form of screenshots from websites where Defendant No. 1 is listed as the seller, but the product labels show Defendant No. 4's details. These products also claim partnership with Hawaiian Herbals, or Defendant No. 3. It is stated that further investigations indicate that neither Defendant No. 3 nor No. 4 likely exist, as official records do not provide details.

18. In this background, the present suit had been filed. Vide order dated 24th September, 2019, an ex parte ad-interim injunction was granted in the following terms:

"7. Having considered the submissions of learned counsel for the plaintiff, I am of the view that the plaintiff has made out a good prima facie case for grant of the injunction sought. In view of the fact that the products are ingestible products related to health and nutrition, the balance of convenience is also in favour of grant of ad interim relief. I am satisfied that the plaintiff would suffer irreparable loss and injury if the injunction sought is not granted.

8. In these circumstances, the defendant Nos.1, 2 and 4 are restrained, until the next date of hearing, from manufacturing or dealing in any products which are packaged in a manner which is identical or deceptively similar to the plaintiffs registered label marks "WELL INTELLECTÉ", 'WELL RED GINSENG POWDER", "WELL JOINT-EASE" and "WELL AMPM", and from using plaintiff's registered work mark "SCI-VEDIC"."

19. In terms of the above order, the Court granted an interim injunction for following marks:

WELL INTELLECTÉ, WELL RED GINSENG POWDER, WELL JOINT EASE, WELL AM-PM, and, word mark SCI VEDIC.

However, the Plaintiff did not press for an injunction on the labels 'WELL D TOX' and 'WELL NATUROPAUSE', as their claims for these labels were based on passing

off.

20. Subsequent to the injunction being granted, the Defendants have been repeatedly served as is evident from the orders dated 2nd December 2019, 26th August 2020, 10th February 2021, passed by the Id. Joint Registrar.

21. The order of the Joint Registrar dated 10th September, 2021 also permitted substituted service under Order V Rule 20(1A) CPC. Repeated opportunities were given to the Defendants to file their written statement; however, no written statement is forthcoming. Vide orders dated 8th April 2021 and 3rd June 2022, the Id. Joint Registrar closed the right of all the four Defendants to file the written statement. The period for filing the written statement also stands closed.

22. In this background, the matter has been listed before the Court. Id. counsel for the Plaintiff has moved an application seeking summary judgment under Order XIII-A CPC. It is stated that the Defendants have taken down the listings from online portals qua the infringing products and have not entered appearance despite being aware of the present proceedings as they were duly served.

23. In the present case, the Defendants has not put up any defense, and their right to file the written statement also stands closed. Thus, in terms of Order VIII Rules 10 CPC, this Court has the discretion either to pronounce judgment against the Defendants, or make such other order in relation to suit as appropriate.

24. In *Disney Enterprises Inc. & Anr. v. Balraj Muttneja & Ors.* [CS (OS) 3466/2012 decided on 20th February, 2014], it has been held that no further evidence would be required in cases where the Defendant has not filed their written statement or has not appeared in the matter, as no purpose is served by calling upon the plaintiff to lead ex parte evidence. This position has been reiterated by the Court in *S. Oliver Bernd Freier GMBH & CO. KG v. Jaikara Apparels and Ors.* [210 (2014) DLT 381], as also, in *United Coffee House v. Raghav Kalra and Ors.* [2013 (55) PTC 414 (Del)].

25. The Defendants having not filed any defence, in terms of the law laid down in *Disney* (supra) and the judgments following the said decision, no evidence is required on behalf of the Plaintiff, especially since the plaint is already filed on affidavit.

26. The product names have been identically copied by the Defendants. The said product names in the form of labels have also been registered by the Plaintiff. Further, the Defendants are using trade dress that is deceptively similar those of the Plaintiff's products, which suggests an attempt to affiliate with or capitalize on the Plaintiff's goodwill in their formative 'WELL' marks. In the opinion of the Court, such activity would lead to confusion in the mind of the consumers, as there is a possibility of the Defendants' products being passed off as those of the Plaintiff's.

27. The Defendants also appear to be using fictitious FSSAI license as alleged by the Plaintiff. The Defendants' products are likely to be confused with Plaintiff, inasmuch as the brand names are identical and product category is also identical.

28. The principles laid down by the Supreme Court in *Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd.* (2001) 5 SCC 73, are squarely applicable to the present matter. The principles laid down by the Supreme Court in *Cadila Health Care Ltd (supra)* have been paraphrased in *Sun Pharma Laboratories Ltd. v. Ajanta Pharma Ltd* 2019 SCC OnLine Del 8443 as follows:

- i) In the case of drugs, a strict test needs to be applied for determining confusion and deception;
- ii) If the products have a difference in composition with completely different side effects, a stricter test should be applied;
- iii) Greater vigilance is required where the products are meant to cure the same ailments, but the compositions are different;
- iv) Merely because drugs are sold under prescription is not sufficient protection against confusion;
- v) The prevalent social conditions and linguistic barriers require stricter measures to be taken, to prevent confusion arising from similarity of marks among medicinal products;
- vi) Physicians and pharmacists are not immune to mistakes;
- vii) A lesser degree of proof to establish confusing similarity would be required in the case of medicinal products as against nonmedicinal products;
- viii) The varying profiles of patients, especially the elderly, illiterate persons and children need to be kept in mind;
- ix) In view of public health issues involved in the case of medicines, stringent measures ought to be adopted."

29. In *Sun Pharma Laboratories Ltd. v. Ajanta Pharma Ltd* 2019 SCC OnLine Del 8443 this Court held that the test for infringement and passing off for nutraceutical products is same as the test applicable for pharmaceuticals. This Court following the judgment of the Supreme Court in *Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd.* (2001) 5 SCC 73 held as follows:

"12. [...] However, this Court is of the opinion that the mere fact that these products are nutritional food supplements or nutraceuticals and are not pharmaceuticals in the strict sense is not convincing enough for adoption of a less stringent test. Pharmaceuticals and nutraceuticals are used in respect of diseases and disorders. They are both meant to address specific ailments. Both these products are meant to improve the health of patients. The mere fact that nutraceuticals are termed so, as they contain ingredients derived from plants, does not mean that a lenient test needs

to be adopted in respect of these products. The effects of the products and the consumers of the products all being similar in nature, the test applicable to pharmaceutical products would be applicable even to nutraceuticals. This Court accordingly rejects the contention of the Defendant that the judgment in Cadila would not be applicable to the present case."

...

24. In the final analysis, the question of grant of interim injunction is to be decided on the factual position in each case. This Court holds that nutraceuticals ought to be treated on par with pharmaceuticals."

30. Therefore, considering the position laid down in Cadila (supra) and Sun Pharma (supra), this Court is of the opinion that in nutrition and wellness products, any chance of confusion ought to be avoided. The settled legal position is that in the case of such pharmaceutical products, health related products and cosmetics and related wellness products a higher standard would be required to be laid down in view of the damage that such products can cause to the consumers.

31. In Mallcom (India) Limited v. Rakesh Kumar, [CS(COMM) 480/2016, dated 19 March, 2019] the ld. Single Judge of this Court has observed:

"24. The test for summary judgment, as prescribed in Rule 3 of Order XIII A of the CPC as applicable to Commercial Courts Act is, that "the defendant has no real prospect of successfully defending the claim" and that "there is no other compelling reason why the claim should not be disposed of before recording the oral evidence".

Rule 1 of Chapter XA of the Delhi High Court (Original Side) Rules merely provides that "At the time of Case Management hearing, a Court, may of its own, decide a claim pertaining to any dispute, by a summary judgment, without recording oral evidence" and Rule 3 therein reiterates the language aforesaid of Rule 3 of Order XIII A qua grounds for summary judgment."

32. Thus, in the facts of the present case, this Court is of the opinion that the present matter is a fit case for grant of summary judgment in terms of Order XIII-A CPC.

33. Accordingly, the Defendants shall stand permanently restrained from manufacturing, selling, offering for sale any cosmetics or wellness products or nutraceuticals products under the 'WELL' formative marks as extracted in paragraphs 6 and 15 above. The Defendants are also restrained from using any other deceptively similar variants for the formative 'WELL' marks, so as to constitute infringement.

34. The Defendants are also restrained from reproducing, printing, or publishing any label or packaging which is a colourable imitation or substantial reproduction of the artistic features of the Plaintiff's WELL Marks extracted above in paragraphs 6 and 15 above and their depiction in artistic writing style, lay-out, get-up, colour scheme, etc., so as to constitute infringement of the Plaintiff's

copyrighted labels.

35. It is clarified that the present order shall not be construed as an order recognizing any monopoly or exclusivity for the Plaintiff in respect of the mark 'WELL'.

36. The online listings of the Defendants' products shall be taken down both from the Defendants' website as also from any third-party websites. If the Defendants do not take them down within two weeks, the Plaintiff is free to write to all online platforms to seek delisting of these infringing products.

37. The present being a commercial suit, actual costs are liable to be granted in favour of the Plaintiff, in view of the decision of the Supreme Court in *Uflex Ltd. v. Government of Tamil Nadu* [Civil Appeal Nos. 4862- 4863 of 2021, Judgment dated 17 September 2021]. Costs statement along with invoices and the memos of fee have been placed on record. The same would show that a total of Rs.11,63,650/- has been incurred as costs in pursuing the present suit. Accordingly, the suit is decreed with costs, in terms of the cost statement for a sum of Rs. 11,63,650/-.

38. The suit is accordingly decreed in the above terms. Decree sheet be drawn. All pending applications are disposed of.

PRATHIBA M. SINGH JUDGE OCTOBER 13, 2023 dj/dn