

The Hershey Company vs Atul Jalan Trading As Akshat Online ... on 15 April, 2024

Author: Sanjeev Narula

Bench: Sanjeev Narula

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IN THE HIGH COURT OF DELHI AT NEW DELHI
CS(COMM) 780/2023, I.A. 21399/2023, I.A.
24575/2023

THE HERSHEY COMPANY

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ATUL JALAN TRADING AS AKSHAT ONLINE TRAD

Through: Appearance not giv
Mr. Harish Vaidyan
CGSC with Mr. Sris
Mr. Alexander Math
Lakshay Gunawat an
V., Advocates for
Ms. Hetu Arora Set
with Mr. Arjun Bas
Mr. Hitesh Bhardwa
Branch Delhi Polic
Mr. Anuj Aggarwal,
with Mr. Yash Upad
Siddhant Dutt, Adv
Police and Food Sa

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

OR

% 15.04.2024 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 27/04/2024 at 01:38:18 I.A. 21398/2023 (application under Order XXXIX Rules 1 & 2 read with Section 151 of the Code of Civil Procedure, 1908 for grant of ad interim injunction)

1. While issuing summons on 30th October, 2023, this Court, taking note of the serious allegations of counterfeiting and sale of re-packaged expired chocolates under the Plaintiff's trademarks, passed an ex parte ad-interim injunction against the Defendants. The said order also appointed two Local Commissioners who were directed to visit and search the Defendants' premises for the purpose of seizing the infringing goods/ expired products which were allegedly being sold by Defendants under the Plaintiff's trademark.

2. The Local Commissioners have submitted their reports which provide alarming details about the conditions and activities at the Defendants' premises. Below is a summary of key observations and findings from these reports:

2.1. The report submitted by Mr. Akshat Agarwal, Advocate, points out as follows:

"7.2. Glaring Observations- Importantly, I wish to specifically highlight a couple of glaring observations at the site of visit:

(xvi) The first floor of Unit 820 (the state of which and observations in respect thereof are captured later in this report) had various chemical products around cartons full of Hershey's products. Upon analysing these chemicals, along with the FSSAI officials, the following extremely glaring, and deeply disturbing facts were noticed:

(A) Many cleaning solutions, and clothes full of chemicals, along with paint-like smell were clearly present on this floor. The FSSAI officer accompanying me, Ms. L. Hruyia (Technical Officer, FSSAI), used the cloth kept on the floor and the chemical liquid-labelled as cleaning solution, on This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 27/04/2024 at 01:38:18 one of the products on the said floor. The said liquid clearly wiped out the manufacturing/expiry and other details of the product very easily.

A video of this experiment using cleaning solution that was found at the premises of Mr. Atul Jalan - conducted by FSSAI officers is annexed (and will be handed over to the Court in 18 a pendrive) herewith as Document 17 (Pictures attached as well).

(B) The FSSAI Officer and I scratched the label on the Hershey's Tin Box. The label that was visible contemplated an expiry date of 25th August 2024. Upon scratching the said label, it was seen that the earlier label that was present was clearly visible, and the expiry date was 31st July 2023. The product thus, was clearly expired and had been relabeled.

A video of the same conducted by me and the FSSAI officers is annexed (and will be handed over to the Court in a pendrive) herewith as Document 18 (Pictures attached as well).

Upon asking Mr. Atul Jalan and Mr. Mridul Jalan if they knew that this label was false and was affixed on top of the original label- they maintained their claim that they had no idea about the same, and they sell whatever they receive from the unidentified supplier- "AS- IS".

xx xx xx

11. Condition and extremely glaring observations on the First and Second Floor of Unit 820 11.1. The state in which the First and Second Floor of Unit 820 were kept is absolutely deplorable. Food items in cartons were thrown all around the floor and in a corner full of dirt and dust. There were chemicals, packaging equipment that were worn and torn, ink like stench, and chemical soaked clothes all around.

11.2. Upon asking the reason of this deplorable state of this floor of the Unit, Mr. Atul and Mr. Mridul Jalan informed me that there was construction work and painting due because of which this was the case.

11.3. In any case, the pictures annexed, describe the situation on this floor aptly.

Pictures in respect of these depictions are annexed This is a digitally signed order.

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11.4. On the First floor of Unit 820, there were clear indications of re- labeling taking place. There were various chemicals and cleaning solutions, open shampoo bottles, along with toilet cleaning equipment that were placed alongside scissors, tapes, clothes soaked in these chemicals and various other equipment. These were around various boxes of Hershey's and other food items, which clearly had no, or expired labels.

11.5. Experiments were conducted by the FSSAI inspectors and by me, clearly showing that the cleaning equipment was being used to erase the manufacturing date, expiry date and MRP information. It was also found that stickers on the back of the products were re-inputted, over the original stickers- which showed that the product was already expired. This shows that re-labelling with new unexpired dates was being performed.

11.6. Around the various chemicals, and in fact in their extreme proximity were a lot of food items spread on the ground, in an extremely unhygienic manner. Upon asking Mr. Mridul Jalan and Mr. Sudhir Jalan about the same, it was revealed that construction work was going on, and in any case these products were to be sorted out.

11.7. Importantly, a carton full of chemical stains was seen, which when opened, had all Hershey's products, which had re-inputted labels that were scratched out to show their real expiry dates- that were crossed.

Glaring pictures in respect of these depictions are annexed herewith as Document 28 (Colly).

11.8. Upon seeing this and noticing the quantity of expired food products being sold, the lack of appropriate labelling, Food Safety and Standards Act compliance, and the fact that an FSSAI license was not taken- Ms. Swati Kumari (Central Food Safety Officer), stated that she could not unsee the same and deemed it appropriate to call the Deputy Director/Central Licensing Authority, FSSAI- Dr. Manisha Narayan, who stated that she would be reaching the venue in another hour."

2.2. Similarly, Mr. Siddharth Singh, Advocate, has also filed a report, wherein he has stated as follows:

"5. Upon inspection of the Hershey kisses movement boxes all the products look like genuine products but upon a closer look it was found that the that all the boxes have been sealed using brown house tape and behind the boxes This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 27/04/2024 at 01:38:19 an information sticker had been pasted to disguise and hide the genuine Hershey product information Containing the actual manufacturing and expiry date and also the actual MRP of the product. It was found that all the Hershey products which were present at the stated premises had expired in August 2023 and stickers had been printed hand pasted upon the actual information of the product to sell the expired product in the market on a higher price."

2.3. Along with aforementioned reports, the Local Commissioners have also enclosed photographs of the samples of infringing products seized from Defendants' premises, which reveal a blatant manipulation of the labelling as follows:

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3. Prima facie, these reports indicate that there is deliberate manipulation of product information and sale of expired goods as genuine being conducted at the Defendant's premises. Despite this, the Defendant opposes the injunction, claiming that the seized goods were legitimately purchased from a third party. To support this claim, they have submitted invoices as evidence of such purchases.

Moreover, they argue that any compliance issues, such as the presence of expired or relabelled products, should be attributed to the supplier rather than to the Defendant themselves.

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4. In the opinion of the Court, the Defendant's stand of unknowingly purchasing infringing goods from a third party does not absolve them of liability and legal consequences arising from the fact that the said goods were found at their premises. To defend their position effectively, they must not only establish the legitimacy of their sources but also demonstrate that they conducted due diligence - both before and after acquiring the goods - so as to mitigate their liability. The burden of proof rests squarely with the Defendant to ensure that their supply chain is transparent and accountable. Simply possessing an invoice is insufficient, especially when confronted with compelling evidence of product tampering and expiry date falsification. Furthermore, the observations recorded by Local Commissioner-Mr. Akshat Agarwal provide critical context that challenges the credibility of the Defendant's defence, relevant excerpt whereof is reproduced hereunder:

"6. Interactions with Mr. Atul Jalan and Mr. Mridul Jalan during the first half of the Commission xx xx xx 6.9. At this point, importantly, I asked Mr. Atul Jalan and Mr. Mridul Jalan as to where do they get their Hershey's supplies from and how many units have they sourced. They informed me that they received the same from Mumbai from one Mr. Shanu. Upon asking how many orders have they received from him, they stated that all Hershey's products came at once, a couple months ago, in one lot with one invoice of Rs. 7,90,000/-. The number of products sourced are not with them, and instead whatever amount of chocolates in different varieties were available for the said amount - they received the same. They also stated that they received a 25% discount on the same.

xx xx xx 6.12. At this point, he also mentioned that he sells whatever he has received from the supplier "AS-IS" and has nothing to do with the packaging of the details mentioned on the same."

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5. The Court is of the view that the compelling evidence gathered by the Local Commissioners points towards the Defendant's involvement in infringing activities. This is sufficient to warrant the confirmation of the ad- interim injunction operating against them. Accordingly, their attempt to redirect liability to the third party supplier from whom they allegedly purchased the products would be of no avail.

6. To elucidate upon this understanding, it would be appropriate to expound upon the manner in the Court must trace liability in cases involving resold products. The fundamental objective of trademark law is to prevent sellers from creating confusion among consumers regarding the source of products. The protection afforded by trademarks serves to assure consumers about the authenticity and origin of the goods they purchase. Accordingly, the use of the Plaintiff's trademark on altered products would prima facie constitute infringement, as the same falsely suggests that the expired product is produced and sold by the Plaintiff.

7. When a genuine article is resold without modifications it retains its original authenticity, thereby not leading to any confusion about its origin. This concept forms the basis of the "first sale" doctrine, which holds that once a trademarked product is sold legitimately by the trademark owner, or with their permission, the trademark owner's rights to control the resale of that product are exhausted. Under this doctrine, subsequent sales of the unaltered, genuine articles typically do not constitute trademark infringement because they do not introduce any confusion regarding the origin of the product. However, if a reseller alters a genuine article in a way that could mislead consumers--such as changing expiry dates--then this This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 27/04/2024 at 01:38:19 would undeniably create confusion about the source and quality of the goods. Such actions can be seen as creating a "materially different" product, which can fall outside the protection of the first sale doctrine and infringe upon the trademark. In these cases, consumers might believe they are buying a product which is backed by the original manufacturer's reputation and assurances, when in fact they are not. Such misrepresentation has the potential of damaging the Plaintiff's brand reputation, while also deceiving consumers and endangering public health. Such circumstances justify the grant of an injunction to prevent further misuse of the Plaintiff's trademark and protect consumer safety.

8. Accordingly, the injunction granted vide order dated 30th October, 2023 stands confirmed.

9. The application is disposed of.

I.A. 25545/2023 (application on behalf of Defendant under Section 151 Code of Civil Procedure, 1908, seeking de-sealing of shop premises and also tendering unconditional apology)

10. Issue notice. Mr. Urfee Roomi, counsel for Plaintiff accepts notice.

11. Reply, if any, be filed within a period of three weeks from today. Rejoinder thereto, if any, be filed within a period of one week thereafter.

12. Re-notify on 6th August, 2024.

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13. Taking note of the severity of the infringement which is subject matter of the present case, the Court has previously passed several detailed orders. In particular, in order dated 19th December, 2023, the Court, noted This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 27/04/2024 at 01:38:19 that the matter required urgent consideration beyond the scope of the present commercial suit, and directed the matter to be placed before Hon'ble the Acting Chief Justice for taking up the issue from the judicial side, in a manner deemed appropriate. Further, the Crime Branch, Delhi Police, was also directed to conduct a detailed investigation into the matter.

14. In terms of the aforementioned order, W.P.(C) 195/2024 has been registered as a PIL (Public Interest Litigation), and the Crime Branch has also registered an FIR No. 0011/2024. The investigation by the Crime Branch is currently underway. Mr. Arjun Basra, counsel representing Delhi Police, states that Delhi Police should be granted access to the goods which were seized by the Local Commissioners, as well as the goods seized by the Food Safety and Standards Authority of India (FSSAI) pursuant to the Court's directions issued on 10th November, 2023.

15. The goods seized by the Local Commissioners are presently in the Plaintiff's custody on superdari. To facilitate the ongoing criminal investigation, the Investigating Officer will coordinate with the Plaintiff's counsel to schedule an inspection of these goods. During this inspection, the Delhi Police will have the opportunity to draw samples for analysis. The Defendants' representatives and counsel are permitted to remain present during this process. Post-inspection, in the presence of all parties involved, the goods will be re-sealed. Delhi Police will ensure that all evidentiary materials are handled in a manner that maintains their integrity and legal admissibility.

16. Similarly, goods that were sealed by the FSSAI and are currently stored on the Defendant's premises should also be inspected by the Investigating Officer. To conduct this inspection, the Investigating Officer This is a digitally signed order.

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17. Re-notify on 6th August, 2024.

SANJEEV NARULA, J APRIL 15, 2024 sapna This is a digitally signed order.

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