

The Hershey Company vs Atul Jalan Trading As Akshat Online ... on 19 December, 2023

Author: Prathiba M. Singh

Bench: Prathiba M. Singh

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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 19th December

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CS(COMM) 780/2023, I.As. 21398/2023, 21399/2023, 21401/24575/2023 & 25545/2023

THE HERSHEY COMPANY

..... Plain

Through: Mr. Urfee Roomi, Ms. Janaki Arun, Ms. Anuja Chaudhury, Mr. Jaskaran Singh, Mr. Ayush Dixit, (M. 9818098835)

versus

ATUL JALAN TRADING AS AKSHAT
ONLINE TRADERS

..... Defendant

Through: Mr. Raj Shekhar Rao, Sr. Adv., Dr. Vikrant Narayan Vausdeva, Mr. Sarthak Chiller, Mr. Rohit Lochav, Ms. Anshi Gupta, Ms. Yamini Mokeerjee, Advs. (M. 9811212045) with Mr. Atul Jalan and his son Mr. Mridul Krishan, Defendants in person.
Mr. Harish Vaidyanathan Shankar, CGSC, with Mr. Srish Kumar Mishra, Mr. Alexander Mathai Paikaday and Mr. Krishnan V., Adv. (M. 9810788606)
Mr Anuj Aggarwal, ASC GNCTD with Mr Yash Upadhyay Adv. for D-GNCTD (M.9871160559)
Mr. Arjun Basra, Adv. Ms. Hetu Arora Sethi, ASC GNCTD (M.

CS(COMM) 780/2023

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CORAM:

JUSTICE PRATHIBA M. SINGH
Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.
2. The present suit reveals to an extraordinary situation involving safety and public health, particularly relating to food products. The present suit was filed by the Plaintiff - The Hershey Company, a well-known chocolate company, seeking an injunction before the Diwali period against the Defendant-Atul Jalan, trading as Akshat Online Traders from selling expired chocolates by re-packaging the same.
3. As per the Plaintiff, the defendant is a rank counterfeiter, causing harm to both the Plaintiff and the public. The Defendant had knowledge of and access to the Plaintiff's marks and packaging, and blatantly copied them, misrepresenting their expired and counterfeit chocolates as Plaintiff's products.
4. The Court had taken note of all the averments made in the plaint and vide order dated 30th October, 2023, had passed a detailed interim order giving directions and appointing Local Commissioners for seizure of all the expired products. Further, due to the urgent and serious nature of the allegations, the Court instructed that two Food Safety and Standards Authority of India (hereinafter, 'FSSAI') Inspectors accompany the LCs to conduct a thorough inspection and testing of all products sold by the defendant. Additionally, the FSSAI was given specific directions to ensure that perishable and food products, which are either expired and repackaged or counterfeit, are not sold, particularly during the festive season. The relevant extract of the said order is set out below:

"33. This Court is convinced that the Plaintiff has made out a prima facie case for grant of an ex-parte ad-interim injunction. In light of the above stated it is also clear that balance of convenience lies in favour of the Plaintiff considering that the counterfeit packaging is used for expired confectionary products, which will be sold and consumed in bulk in this festive season of Diwali. This will cause irreparable loss/harm not only to the Plaintiffs business and reputation but also to the public at large.

34. Accordingly, the Defendant and anyone acting for or on his behalf are restrained from manufacturing, selling, and offering for sale any 'HERSHEY'S' products including chocolates, candies and any other confectionery products till the next date of hearing."

5. Thereafter, on 10th November, 2023, this Court observed that the respective Local Commissioners (hereinafter, 'LCs') had filed their respective reports. The said reports reveal an extremely sorry state of affairs at the Defendant's premises.

Major Findings from the Report of the Local Commissioner- Adv. Akshat Agrawal dated 7th November, 2023:

6. Premises: Unit nos. 819 and 820, Street No. 50, Lekhu Nagar, Tri Nagar, New Delhi. Important observations of the LC in respect of both the units of the Defendant are:

- Various products including the Plaintiff's Hershey's chocolates were found in the premises. The condition of the Defendant's units were poor, with various food, beverage, and cosmetic products present, including large stocks of counterfeit Hershey's chocolates in ripped cartons and marked as 'expired products not for sale'.
- Expired products were stored due to disputes with the supplier and were not returned.

• FSSAI License: The Defendant did not have an FSSAI license to sell or resell the Plaintiff's products, and he did not respond to inquiries about violating the provisions of the FSSAI Act, 2006. • Lack of Transparency and Cooperation: The Defendant displayed reluctance to fully disclose information about their business operations, including details about other units they run and their involvement in the sale of Hershey's products. There were several contradictions in their statements regarding the history and scope of their business, particularly in relation to selling food items. • Unclear Source of Products: The Defendant was unable to provide clear and verifiable details about the source of their Hershey's products, including supplier information and purchase invoices. • Hesitance in Providing Financial Records: They showed reluctance in sharing crucial financial documents like sales invoices, bank account statements, and were evasive about their financial transactions. • Condition of seized Hershey's Products:

- Packaging was worn, torn, and damaged.
- Manufacture and expiry dates were covered or altered.
- Some packs showed conflicting manufacture and expiry dates.
- Discrepancies in MRP on packages.
- Some packs lacked MRP and expiry dates, only showing manufacture dates.
- Re-taped packaging and interchanged products within sets.
- Identical lot numbers on different variations of Hershey's chocolates.
- Many packs had no labels, showing blank sheets.
- Considerable stock of visibly expired products. • Glaring Observations:
- Chemicals were used to wipe off product details.

- Experiments showed that cleaning solutions could easily remove product details.
- Scratching of labels revealed underlying original labels with past expiry dates.
- A pattern of evasion and inconsistency in the responses of the Defendant's representatives-Mr. Atul Jalan, Mr. Mridul Jalan, and Mr. Sudhir Jalan. There is a clear lack of accountability and transparency regarding the handling and sale of expired and relabelled Plaintiff's products.
- FSSAI Intervention:
 - Dr. Manisha Narayan from the FSSAI decided to take over the inspection due to the unlicensed operation and the volume of expired goods. She decided that the FSSAI would need to seal the Defendant's premises to prevent further sale of expired products.
 - Dr. Narayan sought help from the local SHO, Mr. Rajesh Kumar, to seal the premises and for police officers to stay overnight to ensure no expired goods were moved.
 - The police refused to assist beyond providing security, stating that they could not act as guards or help in sealing the premises without an FIR or written request.
 - Dr. Narayan then statedly invoked her powers under the FSSAI Act to prevent any products from leaving the unlicensed premises during the festive season until FSSAI completed the seizure. She also wrote an order under the Food Safety and Standards Act to ensure no products, expired or not, leave the premises. • At Unit 819, the total quantity of counterfeit products found is 1,604 units. The approximate total value of these products is Rs.2,77,400/-. • At Unit 820, the total quantity of counterfeit products found is 1,563 units. The approximate total value of these products is Rs.3,46,201/-. Major Findings from the Report of the Local Commissioner- Adv. Siddharth Singh dated 8th November, 2023:
- Premises: '2/5, Sabzi Mandi Road, Moti Nagar, New Delhi'.
- Approximately 25-30 boxes of the Plaintiff's products- 'Hershey Kisses Moments' were displayed, with many more unopened cartons and boxes present. These products were found to be expired as of August 2023, with new information stickers covering the original manufacturing and expiry dates, and the MRP. It was discovered that four separate expired products of the Plaintiff were being sold at the premises.
- The premises were found to be operating without a valid license, leading to a show-cause notice being served to the Store Manager. • A total of 133 boxes of

expired products were found, with 12 boxes sealed and signed by State Food Safety Officers for evidence. • The invoices found indicated that while products worth Rs. 1,34,299 had been supplied, only products worth Rs. 83,790 were found, suggesting some products were sold or missing. • 121 boxes of Plaintiff's products were seized from the premises and released on superdari to the Plaintiff's representative. • Food Safety Officers collected samples of 91 different items from the store to verify their authenticity.

- The Central Food Safety Officers issued a notice to the Defendant for destruction of these expired products, deemed unfit for human consumption, and mandated the submission of a destruction report with evidence.

7. The LCs seized a significant inventory of the Plaintiff's products, which were taken into custody on superdari. Additionally, expired products from other companies were also discovered on the Defendant's premises, raising serious concerns for public health, particularly during the festive season when these expired products might be mixed with fresh ones in retail.

8. The summary of the LCs' reports reveal that the Defendant not only had the stock of expired products of the Plaintiff but also of various other food product companies. In fact, various devices and tools were also found wherein the expiry date on the products was being erased and fresh expiry dates were being printed on the said products. Considering this position, vide order dated 10th November, 2023, the following directions were issued.

"4. Today, the reports of the Local Commissioners have been received. The same reveal an extremely unfortunate situation where a huge stock of products including chocolates, confectionery, oil, food products, and other related products have been found at the Defendant's premises. The reports of the Local Commissioners record that new expiry dates are being printed on the already expired products. The Local Commissioners have also found the chemicals that are being used to erase the expiry date on original products.

5. The Local Commissioners seized a large inventory of Plaintiff's products and the Plaintiff had taken the same on superdari. However, it is noticed from the report of the Local Commissioners that there are expired food products of other companies lying at the Defendant's premises. If the same are illegally sold by the Defendant it could be harmful for human consumption. This is a cause for huge concern, especially, during the current festive season when there is the possibility of expired products being mingled and mixed by retailers with genuine unexpired products and fresh products.

6. Accordingly, Mr. Anuj Agarwal, Id. ASC for the GNCTD has been requested to accept notice on behalf of the Department of Food Safety, GNCTD.

7. Officials from the Department of Food Safety, GNCTD along with officials from FSSAI shall visit the following premises immediately where Defendant is stated to be stocking the expired products:

(i) 1st Floor. House No.820/50. Lekhu Nagar.

Tri Nagar. Delhi, 110035.

(ii) 819, Street No.50, Lekhu Nagar, Tri Nagar, Delhi-110035

(iii) 2/5, Sabji Mandi Road, Near Union Bank ATM, Moti Nagar, Delhi-110015

(iv) UG-17, Somdutt Chamber 2, Bhikaji Cama Place, Delhi

8. The mandate of the officials from the Department of Food Safety, GNCTD, and FSSAI is as under:

(i) The officials from the Department of Food Safety, GNCTD and FSSAI shall seize all the expired products including chocolates, confectionery, oil, food products, and other related products lying at the aforementioned premises.

(ii) The officials from the Department of Food Safety, GNCTD, and FSSAI are also free to seal the Defensant's premises if a large stock of expired goods is found.

(iii) Upon being requested, the concerned S.H.O. shall extend complete assistance to the officials from the Department of Food Safety, GNCTD, and FSSAI at the Defendant's premises.

(iv) The officials from the Department of Food Safety, GNCTD and FSSAI are permitted to take photographs and videograph the proceedings.

(v) The officials from the Department of Food Safety, GNCTD, and FSSAI shall visit the Defendant's premises within one week. A report shall be filed by the Department of Food Safety, GNCTD within one week, thereafter.

(vi) The officials are also authorized to take samples of the expired products. The same shall be got tested.

9. Further, let a formal complaint be registered with the concerned local police station to take action against the said Defendant in accordance with the law.

10. In the meantime, let non-bailable warrants be issued against Defendant - Mr. Atul Jalan [M:9650502388,] who is stated to be the person running the entire operation of expired products. The said warrants shall be given effect to by the SHO - PS Keshav Puram."

9. Again, vide order dated 8th December, 2023, on an application being moved by the Defendant, NBWs were suspended and the following directions were issued directing the Defendants to give the details of the source of these products:

"3. Today, Mr. Raj Shekhar Rao, Id. Senior Counsel on behalf of Mr. Atul Jalan submits that due to some medical illness the Defendant has been hospitalised in Hisar. His son Mr. Mridul Krishan is present in Court and submits that he is doing business along with his father. Considering the nature of the matter, which involves sale of expired food products such as chocolates etc., Mr. Atul Jalan and his son Mr. Mridul Krishan shall remain present in Court on the next date of hearing.

4. On behalf of the GNCTD, Mr. Anuj Aggarwal, Id. ASC shall file a status report along with confirmation if any FIR has been lodged and any investigation is being carried out against the Defendant.

5. Non-bailable warrants qua the Defendant shall stand suspended for the time being, on the undertaking of Mr. Vikram Vasudev, Id. Counsel for the Defendant that his client shall remain present on the next date of hearing.

6. In the meantime, Mr. Atul Jalan and his son shall give details of all the sources from whom they have procured these expired products to the FSSAI and to the GNCTD so that further investigation can be carried out and any other third parties who may be involved in selling expired food products can also be booked."

10. Today, a further disturbing situation has been revealed. The FSSAI officials and Drugs Inspectors from the GNCTD appear to have sealed the premises of the Defendant only on the 16th/17th November, 2023 though the initial inspection with the LCs took place on 3rd November, 2023. Id. Counsel for the Plaintiff Mr. Urfee Roomi has pointed out that between the date of execution of the commission by the LCs and the sealing of the Defendant's premises by FSSAI officials, the Defendants moved all non- Hershey products observed by the LCs to new premises. The Defendant has now started selling those very expired products under the name and style of Shiv Traders.

11. Videos have been submitted and placed on record to show how Defendant-Mr. Mridul Krishan, son of Mr. Atul Jalan, both of whom have been present at various hearings before this Court, is promoting the expired counterfeit products. Id. Counsel for the Plaintiff has also pointed out that payments were made through Paytm (linked to the Defendant's Paytm account), and the Plaintiff has made purchases of expired product. On being queried both these individuals expressed no remorse whatsoever. Further Id. Counsel for FSSAI is unable to inform the Court as to what action was taken against the Defendants under the prevalent food laws to ensure that the Defendants stop re-packaging and sale of such goods. Despite FSSAI being aware of the Defendants, no complaint has been lodged till date and the Defendants were able to move the stock to another premises and continue their business.

12. The issue in the present suit relates only to Hershey's products. However, the scale of the Defendant's operations is bigger. From the events which have transpired, there appears to be a coordinated and a systematic manner in which expired products are being re-packaged or rebranded with new expiry dates, and are being introduced into the markets. From the statements made by the Defendant's representatives before the Court, it appears that a large quantity of goods especially on e-commerce platforms, which achieve expiry dates, are somehow purchased by unscrupulous persons, the manufacturing and expiry dates are changed and re-introduced into the stream of commerce. Moreover, it appears that the FSSAI is not fully able to file complaints and take action on an urgent basis in such cases. The matter requires urgent consideration and is beyond the scope of the present commercial suit.

13. Accordingly, the present order may be placed before Hon'ble the Acting Chief Justice for being taken up on the judicial side in the manner as deemed appropriate.

14. Ld. Counsel for the Plaintiff may continue to assist the Court.

15. Let the records of this suit along with LCs' reports, the FSSAI status reports and pleadings, if any, be placed along with the present order before Hon'ble the Acting Chief Justice.

16. Crime Branch, Delhi Police is also directed to conduct a detailed investigation into this matter and place a status report before the said writ Court and before this Court.

17. List for further proceedings on 10th January, 2024.

18. It is made clear that the Defendant's representatives- Mr. Atul Jalan, Mr. Mridul Jalan, and Mr. Sudhir Jalan shall remain present before the Court on the next date of hearing as well.

19. This shall be treated as a part heard matter.

PRATHIBA M. SINGH JUDGE DECEMBER 19, 2023/dk/dn