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DS CONFECTIONERY PRODUCTS LIMITED

v.

NIRMALA GUPTA AND ANR

Kanika Khanduja

Advocate

INTRODUCTION

The present case¹, delves into matters related to intellectual property rights, with special focus on trademark infringement and copyright violation in India. It revolves around the issue that the defendants' trademarks 'PLUS++' and 'PELSE', which relate to hard-flavored and fruit-flavored candies, infringe upon the plaintiff's well-known brand 'PULSE'.

The Trademarks Act,1999 is the concerned law for trademarks in India. Section 2(1)(zg)² defines a well-known trademark. Furthermore, the case also delves into 'original artistic works' that is linked to the plaintiff's label that is registered under the Copyright Act,1957.³ As the owner of the trademark "PULSE," the plaintiff claims that his mark is well-known and alleges trademark infringements on "PLUS++" and "PELSE" by defendants.

This project gives in depth analysis of the case by including brief facts, issues involved, Court's observations, contentions of parties, judgement and researcher's personal views about the case.

BRIEF FACTS

The plaintiff claims exclusive rights over the trademark PULSE/ and its overall trade dress, and alleges that defendants are using similar marks PELSE/ and PLUS++/, thereby infringing upon the plaintiff's trademark.

¹ *DS Confectionery Products Limited V. Nirmala Gupta*

² The Trademarks Act,1999 (Act 47 Of 1999).

³ The Copyright Act,1957 (Act 14 Of 1957),s.2(c).

The plaintiff holds the trademark 'PULSE,' for products such as fruit and hard-flavoured candies. The plaintiff, brings before the Court, a judgement of this very court which demonstrates that PULSE is a well-known trademark.⁴

Further, it is averred by the plaintiff that the proprietorship business M/s Silver Products is connected to the defendants. They have listed their candies on third-party websites such as www.indiamart.com, with the marks 'PLUS++' and 'PELSE'.

On June 17, 2020, the plaintiff was granted an ex-parte ad-interim injunction by an order of this Court, restraining the defendants from producing, marketing, or selling products with the marks 'PELSE' and 'PLUS++.' The defendants were served via e-mail, but they were proceeded ex-parte on account of non -appearance despite service⁵. By the same order, the ex- parte ad interim injunction was made absolute till the final adjudication of the present suit.

The plaintiff sought a summary judgment under Rule 27 of The Delhi High Court Intellectual Property Division Rules, 2022 and Order XIII-A of the Code of Civil Procedure.

The Hon'ble Delhi High court has given detailed observations to determine the issues of alleged infringement and violations.

ISSUES RAISED

Trademark Infringement:

- Whether the plaintiff's trademark 'PULSE' is infringed by the defendants' marks 'PLUS++' and 'PELSE'?

Deceptive Similarity:

- Whether the marks of the defendant are so similar so as to fall under 'deceptive similarity'?
- Whether the degree of deceptive similarity is to the extent of causing confusion among the consumers?

Copyright Infringement:

- Whether the use of similar trade dress by the defendant also result in copyright infringement of the registered artistic right of plaintiff's label 'PULSE'?

ARGUMENTS ADVANCED

⁴ *Dharampal Satyapal Sons Private Limited v. Akshay Singhal*, CS(COMM) 129/2019.

⁵ See Supra Note 4

By the plaintiff-

- It is the contention of the plaintiff that he has exclusive rights over the well-known mark 'PULSE' used for its candy products. This well-known status was recognized in the previous case.⁶
- The plaintiff also contends that the defendants' marks, 'PLUS++' and 'PELSE,' are deceptively similar to 'PULSE.'
- Furthermore, the addition of "++" or the deletion of the alphabet "E" does not create distinction that is sufficient enough to bypass phonetic similarity.
- There is also a similar color scheme and packaging used by the defendant again making the marks deceptively similar.
- Further, the plaintiff, in order to make his contention strong and convincing ,provides a detailed list of similarities and comparison, including but not limited to
- Identical writing
- Writing style and arrangement of the letters of tradenames
- Slant divides in packaging
- Fruit positioning
- Tagline positioning

By the defendant-

The defendants chose not to file their written statements, nor have they entered appearance in suit to defend the same⁷.

RELIEFS CLAIMED

The plaintiff, in the present suit, has prayed for a decree of permanent injunction against the defendants restraining them from-

- manufacturing
- selling
- offering for sale
- advertising
- indulging in any other activities that could infringe upon plaintiff's intellectual property rights⁸.

⁶ *Supra* Note 4

⁷ *Supra* note 1 at 13.

⁸ *Supra* note 1 at 1.

Further, the plaintiff prays for-

- Delivery up
- Rendition of accounts
- Costs and damages.⁹

COURT'S DETAILED OBSERVATIONS

The Hon'ble Court did a comprehensive analysis and found striking similarities between the products in terms of their presentation in

- writing style
- colour scheme
- packaging
- tagline placement
- position of fruit
- overall packaging ultimately leading to the conclusion of
- deceptive similarity between the parties' respective products,
- further leading to likelihood of confusion among consumers.

The court examined and considered the following similarities presented by the plaintiff, while analyzing the comparison between the parties' impugned marks-

- **Writing Style-**
Identical manner of writing of "PULSE" {plaintiff's} on one hand and "PLUS++" , "PELSE" {defendants'} on the other hand .
- **Arrangement and placement of letters-**
Identical alternate arrangement of letters "PULSE" {plaintiffs} on one hand and "PLUS++", "PELSE" {defendants} on the other hand. Also, the placement of letters is in an identical way, in the centre of the package near slant divide manner.
- **Font-**
White colour capital font used in "PULSE" {plaintiffs} on one hand and "PLUS++" "PELSE" {defendants} on the other hand.
- **Colour Scheme-**
Identical shades of colour outlining in the said marks.

⁹ *Supra* note 1 at 2.

- **Slant divide-**
Identical slant divide between the package splitting the package into two halves.
- **Fruit positioning –**
Identical manner and location of half sliced mango on packaging of “PULSE” {plaintiffs} on one hand and “PLUS++” {defendants} on the other hand.

JUDGEMENT

The Court found the defendants to be guilty of-

- Infringement of plaintiff’s registered marks
- Passing off
- Copyright violation vested in plaintiff’s registered label.¹⁰

The Hon’ble Court granted-

- a permanent injunction in favour of the plaintiff, restraining the defendants from:
 - manufacturing,
 - selling,
 - and advertising confectionery products under the impugned marks.
- Also, damages of Rs. 2,00,000/- were awarded to the plaintiff.
- Costs of the suit to plaintiff.¹¹

CASE ANALYSIS BY RESEARCHER

This analysis covers the researcher’s observations, viewpoints, suggestions, opinions regarding the case-

1. **Plaintiff’s efforts in putting forward his arguments-**

The plaintiff has meticulously established his case, covering multifaceted aspects like registration of trademark at national and international level, detailed expenditure and sales figures of his products under the “PULSE” trademark etc.

¹⁰ *Supra* note 1 at 12.

¹¹ *Supra* note 1 at 17.

He has further brought a judgement of this very court to establish that his trademark is a well-known trademark

Observation- Plaintiff has taken due efforts to establish ‘distinctiveness’ of his trademark “PULSE”.

Also, strengthened his claim of deceptive similarity between the marks of both parties by giving a point-by-point similarity chart between the parties’ respective marks.

2. Defendants’ defence- Had the defendants put forward their defence, they could have put forward the point, that similarities between “PULSE” and “PELSE” and overall packaging of both are not similar enough to deceive/confuse the consumers.

Observation- There is only a miniscule amount of alternate arrangement in the letters ‘PELSE’, in comparison to that of ‘PULSE’.

In addition to this, the shades of colour outlining are not similar, neither the font colour appears to be pure white in ‘PULSE’, which is adopted in ‘PELSE’.

On careful scrutiny, “PULSE” – font appears to be white with a hint of other colours.

3. Summary Judgement-

The researcher agrees with the Court's decision to grant a summary judgment owing to the defendants' failure to present their defense and non-appearance.

This reflects judiciary’s commitment to speedy disposal of commercial disputes.

4. Damages and Costs-

The researcher appreciates the judgement of the Court regarding the damages awarded in favour of plaintiff owing to the defendants’ evasion of appearance from court.

It would also act as a deterring factor to ensure due compliance of law and its procedure. The reliance placed on various judgements to determine whether to award and what amount to award as damages in such case is noteworthy.

However, there could be a more detailed explanation of the quantum of the amount awarded i.e. Rs 200000, which could have provided more clarity to readers and the parties concerned.

5. Holistic approach-

The analysis considered and evaluated by the Court while determining the question of trademark infringement and the elements of deceptive similarity, reflects a holistic approach and application of judicial mind thoroughly.

As, the elements of comparison which might not be sufficient enough to establish infringement on the part of the defendants, when considered cumulatively did result to a single result i.e. trademark infringement and copyright violation on the part of defendants. Furthermore, the case dealt with both copyright violation and trademark infringement in “PULSE”, clarifies that

there can be protection availed for intellectual property rights under more than one category depending upon the law concerned and category of which protection is availed.

6. Careful scrutiny-

The researcher further appreciates the extremely careful scrutiny and appraisal of evidence done by the court. The consideration of

- plaintiff's marks' registration status and their respective application dates,
- precedent of "PULSE" being a well-known trademark,
- the factor of likelihood of confusion among consumers, which is a key ingredient for determining deceptive similarity

is very insightful and noteworthy.

Observation- It is to be noted that, the Hon'ble High court has considered the adherence of law to the core, as while considering the elements of deceptive similarity, Section 2(1)(h)¹² has been kept in mind throughout.

Not only the near resemblance of the of the marks, but also it being to the extent of likelihood of deception or causing confusion among the consumers has been considered.

7. Overall point of view-

The researcher agrees with the decision of the Court as it rightly protects the rights of the plaintiff keeping in mind, the ultimate aim and objective of protection of intellectual property rights.

And at the same time, the researcher appreciates the Court's decision of awarding damages to plaintiff, which will make the defendants understand the legal ramifications of non-appearance.

Observation- For a student and readers, this case law provides clarity about the concept of deceptive similarity on a deeper level by emphasizing on phonetic similarity, visual similarity and likelihood of confusion among consumers with respect to eatables by placing reliance on legal precedents.

CONCLUSION

The case highlights the importance of protection of intellectual property rights. It gives a comprehensive view of judicial thinking and interpretation of law with regard to practical scenarios and the association of copyrights and trademarks. Also, the case focuses on the point, that while considering the element of deceptive similarity, in order to make the rightful

¹² The Trademarks Act, 1999 (Act 47 Of 1999).

decisions, it is important to consider the factors which individually might not contribute to deceiving the consumers but cumulatively could. The researcher has provided her insights about the case study based on her understanding of law and the case at hand.