

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 03.11.2022
Date of decision: 22.11.2022

+ **CS(COMM) 176/2020**

DS CONFECTIONERY PRODUCTS LIMITED

..... Plaintiff

Through: Ms.Vaishali Mittal, Mr.Rohin
Koolwal, Advs.

versus

NIRMALA GUPTA AND ANR


..... Defendants

Through: None.

CORAM:


HON'BLE MR. JUSTICE NAVIN CHAWLA

1. The present suit has been filed by the plaintiff praying for a decree of permanent injunction against the defendants restraining them from manufacturing, selling, offering for sale, advertising, directly or indirectly dealing in any manner with confectionery products and/or any other goods and services including but not limited to hard flavoured candies and/or fruit candies and/any other

goods and services using the trade mark **PELSE/** , the trade mark as also trade dress for



PLUS++/ under the **SNEH** trading style or any other trademark, containing the plaintiff's trademark and

copyright in **PULSE/** , or any other mark deceptively similar thereto, which would amount to either infringement, passing off, dilution, unauthorised representation or unfair competitions. The plaintiff further prays for delivery up, rendition of accounts, costs and damages.

2. Vide order of this Court dated 20.08.2020, the defendants were proceeded with *ex-parte* in the present suit.


3. It is the case of the plaintiff that it is a part of the Dharampal Satyapal Group, a diversified conglomerate founded in the year 1929, and is engaged in the business of food and beverage products, confectionery, hospitality, mouth fresheners, *paan masala*, tobacco, agro forestry, rubber threads, infrastructure and dairy segments. The plaintiff asserts that it has been a leading industrial player creating premium high-quality products for a wide range of consumers in India as well as internationally. Across the multiple sectors of industry that the plaintiff conducts its business in, it is recognized as a market leader in traditional natural mouth

fresheners as also mini chewing gums, adopting trade names such as, 'Catch', 'Pass-Pass', 'Tulsi', 'Rajnigandha' and 'Chingles'.

4. The plaintiff's goods under the trademark **PULSE** and the trade-dress associated with its product **PULSE** along with the 'Kachcha Aam' flavoured candy, written as 'Kachcha Aam with Tangy Twist', marked the plaintiff's foray into the candy product segment. The candy product was conceptualized around early 2013 and introduced for sale to the general public in December, 2014. The trade mark and packaging of the **PULSE** candy along with its trade-dress is reproduced hereinbelow:



5. The plaintiff also launched its candy bearing the trade mark

PULSE/  in four different flavours- Guava and Orange in the year 2016; Pineapple and Litchi in the year 2017. The plaintiff further launched a sweetened drink as also a 'no salt, sugar free' variant of the candy, both bearing the trade mark

PULSE/  .





6. The plaintiff gives details of its expenditure regarding the advertisements and promotion between the years 2014 to 2018 of






its trade mark **PULSE** in paragraph 16 of the plaint.

7. The plaintiff also gives its sales figures of the products under the **PULSE** trademark for the period 2014-2015 to 2017-2018, in paragraph 18 of the plaint, with the sales rising from Rs. 1.89 Crore to Rs. 329.17 Crore during this period.

8. The plaintiff gives the details of the registrations granted/applied for its trade marks, as under:

Trade mark Application No.	Trademark	Class	User Date	Date of Application	Status
2827909		30	01.04.2013	16.10.2014	Registered
3071704		30	01.04.2013	07.10.2015	Registered
3071705		30	01.04.2013	07.10.2015	Registered
2891666		30	01.04.2013	29.01.2015	Opposed
2827906	PULSE (word)	30	01.04.2013	16.10.2014	Opposed

3103619		30	01.04.2013	23.11.2015	Registered
3854008		30	01.04.2013	07.06.2018	Registered
3854009		30	01.04.2013	07.06.2018	Registered
3854010	PULSE SHOTS	30	01.04.2013	07.06.2018	Registered
3188874	PULSE	32	01.10.2015	17.02.2016	Registered
3364213	PULSE	32	01.04.2013	16.09.2016	Accepted

9. The plaintiff asserts that its mark has also been registered/applied for in other countries, details whereof are given in paragraph 22 of the Plaint.

10. The plaintiff also submits that this Court in its judgment dated 17.10.2019, titled *Dharampal Satyapal Sons Private Limited v. Mr. Akshay Singhal & Ors.*, CS(COMM) 129 of 2019, has declared the trade mark **PULSE** as a ‘*well-known trade mark*’ under Section 2 (1) (zg) of the Act.

11. The plaintiff submits that the **PULSE** labels such

as  are ‘*original artistic works*’ within the ambit of Section 2(c) of the Copyright Act, 1957 and that the plaintiff is the holder of the copyright in the artistic work for its orange and guava flavoured candy vide registration number A-122599/2017 dated 26.12.2017.

12. It is the case of the plaintiff that around the first week of May 2020, the plaintiff learned of the defendants' activities of

advertising and selling candies bearing the mark **PELSE/** as well as raw mango-flavoured candies bearing the mark



PLUS++/ and trade dress under the **SNEH** trading style.



13. The plaintiff submits that vide internet searches, it came across the defendants' proprietorship concern, that is, M/s Silver Products, highlighted on third party websites such as www.indiamart.com wherein the defendants had listed their candy

goods bearing the impugned marks **PELSE/** and



PLUS++/



14. The plaintiff further states that a search of the GST number of M/s Silver Products, indicates that the defendant no. 1 is the owner of the same, whereas the listing of M/s Silver Products on www.indiamart.com shows that the defendant no. 2 also owns and is involved in managing the affairs of the proprietorship concern.

PROCEEDINGS BEFORE THIS COURT

15. Vide order of this Court dated 17.06.2020, an *ex-parte ad-interim* injunction was issued restraining the defendants from manufacturing, selling, offering for sale, and advertising, directly or indirectly, the goods bearing the impugned trade marks

PELSE/  **and PLUS++/** 

16. On 16.07.2020, the learned counsel for the plaintiff submitted before the Court that the defendants had been served *via* e-mail. Thereafter, as noted hereinabove, vide order of this Court dated 20.08.2020, the defendants were proceeded *ex-parte* on account of non-appearance despite service, albeit on an alternate address. Vide the same order, the *ex-parte ad-interim* injunction dated 17.06.2020 was made absolute till the adjudication of the present suit.

17. Though the matter had been listed before the learned Joint Registrar (Judicial) for recording of plaintiff's evidence, the learned counsel for the plaintiff submitted that the present case is fit for passing of a Summary Judgment in terms of Order XIII-A of the Code Of Civil Procedure, 1908, as applicable to commercial disputes of a specified value, read with Rule 27 of The Delhi High Court Intellectual Property Division Rules, 2022 (in short, "IPD Rules"), against the defendants.

ANALYSIS AND FINDINGS


18. I have considered the submissions of the learned counsel for the plaintiff.

19. From the averments made in the Plaint, which remain unrebutted, it is evident that the plaintiff is the proprietor of the mark **PULSE** used for its product, that is, hard flavoured candies/fruit candies. In *Mr. Akshay Singhal (supra)*, this Court has held the plaintiff's mark **PULSE** to be a well-known trade mark as defined in Section 2(1)(zg) of the Act.





20. The trade mark adopted by the defendants, that is, **PLUS++** as also **PELSE** are deceptively similar to that of the plaintiff. Mere addition of the sign "++" or deletion of the alphabet "E" from the mark of the plaintiff, in my opinion, is not sufficient to bring about a distinction in the two marks, as the same would remain phonetically similar. Similarly, replacement of the alphabet "U" by "E" in the mark **PELSE** by the defendants would also not bring about sufficient distinction between the mark of the plaintiff and the defendants to answer the test of deceptive similarity of the two

marks. The adoption of colour combination of twin colours and the presence and placement of the fruit(s) on the trade dress adds to the deceptively similarity of the two marks.

21. That apart, even the colour scheme and the overall packaging of the products adopted by the defendants appear to be deceptively similar to that of the plaintiff's. The same has been highlighted by the plaintiff as under:-

PLUS++ CANDIES bearing the tagline <i>Kachcha Aam with Khatta Meetha Masala</i>		
MANNER OF USE BY THE PLAINTIFF	#	MANNER OF USE BY THE DEFENDANT
	1 2 3	
	4 5	
	6	

S. NO	ELEMENTS OF SIMILARITY
1.	<i>The identical manner of writing and placing of PULSE vis-à-vis Defendant's adoption of PLUS++ with identical shades of color outlining</i>
2.	<i>The identical manner of writing "PULSE" in the centre of the package near the slant divide in white capital font</i>
3.	<i>The identical slant divide between the package dividing the package into two halves between the package;</i>
4.	<i>The identical manner and location of the mango fruit partially sliced similar to the half cut fruit mango on the Plaintiff's PULSE packaging;</i>
5.	<i>The deceptively similar adoption and manner of positioning the tagline "Kachcha Aam with Tangy Twist " adjacent to the mango as that of the Plaintiff's tagline "Kachcha Aam with Khatta Meetha Masala" positioned similarly.</i>
6.	<i>Identical manner of writing PLUS++ along with placement of other elements as that of the Plaintiff on the jar with a green lid.</i>

ADOPTION OF DECEPTIVELY SIMILAR TRADEMARK "PELSE" BY THE DEFENDANTS		
MANNER OF USE BY THE PLAINTIFF	#	MANNER OF USE BY THE DEFENDANTS
	1 2	
	3 4	

S.NO.	ELEMENTS OF SIMILARITY
1.	The identical manner of writing and placing of PELSE vis-à-vis Defendants' adoption of PULSE with identical shades of color outlining
2.	The identical manner of alternate arrangement of the letters PELSE identical to the Plaintiff's PULSE
3.	The use of white color capital font to write the PELSE trademark as adopted by the Plaintiff
4.	The identical manner of writing "PULSE" in the centre of the package with a slant divide manner.

22. In *Mondelez Foods India Pvt. Ltd. and Another v. Neeraj Foods Products*, 2022 SCC OnLine Del 2199, while placing reliance on a judgment of this Court in *ITC Ltd. v. Britannia Industries Ltd.*, (2016) 233 DLT 259, this Court has held that when the product is an eatable which are sold over the counters and not expensive, the colour scheme of the packaging plays an important role in the consumer making an initial choice and in enabling a discerning consumer to locate the particular brand of a manufacturer. In some cases, however, it is possible that such a purchaser after having been misled into an initial interest in a product manufactured by an imitator discovers his folly, but this initial interest being based on confusion and deception can give rise to a cause of action for the tort of passing off, as the purchaser has been made to think that there is some connection or nexus between the products and business of two disparate companies. The above observations are fully applicable to the facts of the present case.

23. In view of the above, I find the defendants to be guilty of infringement of the plaintiff's registered marks as also passing off. The same is also in violation of the copyright vested in the artistic work of the plaintiff's label registered under the registration no. A-122599/2017.

24. Adoption of the similar trade mark and trade name by the defendants is not only a violation of the rights of the plaintiff, but may also deceive general unwary consumers and appears dishonest.

25. In the present case, the defendants have chosen not to file their written statements, nor have they entered appearance in the suit to defend the same. In my opinion, therefore, this is a fit case where a Summary Judgment in terms of Order XIII-A of the Code Of Civil Procedure, 1908, as applicable to commercial disputes of a specified value, read with Rule 27 of the IPD Rules deserves to be passed in favour of the plaintiff and against the defendants.

26. This Court, in *Su-Kam Power Systems Ltd. v. Kunwer Sachdev and Another*, 2019 SCC OnLine Del 10764, has held as under:

“90. To reiterate, the intent behind incorporating the summary judgment procedure in the Commercial Court Act, 2015 is to ensure disposal of commercial disputes in a time-bound manner. In fact, the applicability of Order XIII A, CPC to commercial disputes, demonstrates that the trial is no longer the default procedure/norm.

91. Rule 3 of Order XIII A, CPC, as applicable to commercial disputes, empowers the Court to grant a summary judgement against the defendant where the Court considers that the defendant has no real prospects of successfully defending the claim and there is no other compelling reason why the claim should not be disposed of before recording of oral evidence. The expression “real” directs the Court to examine whether there is a “realistic” as opposed to “fanciful” prospects of success. This Court is of the view that the expression “no genuine issue

requiring a trial” in Ontario Rules of Civil Procedure and “no other compelling reason....for trial” in Commercial Courts Act can be read mutatis mutandis. Consequently, Order XIII A, CPC would be attracted if the Court, while hearing such an application, can make the necessary finding of fact, apply the law to the facts and the same is a proportionate, more expeditious and less expensive means of achieving a fair and just result.

92. Accordingly, unlike ordinary suits, Courts need not hold trial in commercial suits, even if there are disputed questions of fact as held by the Canadian Supreme Court in Robert Hryniak v. Fred Mauldin, 2014 SCC OnLine Can SC 53, in the event, the Court comes to the conclusion that the defendant lacks a real prospect of successfully defending the claim.”

27. In view of the above, the plaintiff has been able to make out a case for grant of prayers made in paragraph 69 (i) to (vi) and (viii) of the Plaint.

28. As far as the relief of damages and rendition of accounts is concerned, this Court in **Intel Corporation v. Dinakaran Nair & Ors.**, 2006 SCC OnLine Del 459 has held as under:

“13. The only other question to be examined is the claim of damages of Rs. 20 lakh made in para 48(iii) (repeated) of the plaint. In this behalf, learned Counsel has relied upon the judgments of this Court in Relaxo Rubber Limited v. Selection Footwear, 1999 PTC (19)

578; *Hindustan Machines v. Royal Electrical Appliances*, 1999 PTC (19) 685; and *CS (OS) 2711/1999, L.T. Overseas Ltd. v. Guruji Trading Co.*, 123 (2005) DLT 503 decided on 7.9.2003. In all these cases, damages of Rs. 3 lakh were awarded in favour of the plaintiff. In *Time Incorporated v. Lokesh Srivastava*, 2005 (30) PTC 3 (Del) apart from compensatory damages even punitive damages were awarded to discourage and dishearten law breakers who indulge in violation with impunity. In a recent judgment in *Hero Honda Motors Ltd. v. Shree Assuramji Scooters*, 125 (2005) DLT 504 this Court has taken the view that damages in such a case should be awarded against defendants who chose to stay away from proceedings of the Court and they should not be permitted to enjoy the benefits of evasion of Court proceedings. The rationale for the same is that while defendants who appear in Court may be burdened with damages while defendants who chose to stay away from the Court would escape such damages. The actions of the defendants result in affecting the reputation of the plaintiff and every endeavour should be made for a larger public purpose to discourage such parties from indulging in acts of deception.

14. A further aspect which has been emphasised in *Time Incorporated*

case (supra) is also material that the object is also to relieve pressure on the overloaded system of criminal justice by providing civil alternative to criminal prosecution of minor crimes. The result of the actions of defendants is that plaintiffs, instead of putting its energy for expansion of its business and sale of products, has to use its resources to be spread over a number of litigations to bring to book the offending traders in the market. Both these aspects have also been discussed in CS(OS) No. 1182/2005 titled Asian Paints (India) Ltd. v. Balaji Paints and Chemicals decided on 10.3.2006. In view of the aforesaid, I am of the considered view that the plaintiff would also be entitled to damages which are quantified at Rs. 3 lakh.”

29. In the case of **Hindustan Lever Ltd. and Anr v. Satish Kumar**, 2012 SCC OnLine Del 1378, this Court again held as under:

“23. One of the reasons for granting relief of punitive damages is that despite of service of summons/notice, the defendant had chosen not to appear before the court. It shows that the defendant is aware of the illegal activities otherwise, he ought to have attended the proceedings and give justification for the said illegal acts. Since, the defendant has maintained silence, therefore, the guilt of the defendant speaks for itself and the

court, under these circumstances, feels that in order to avoid future infringement, relief of punitive.”

30. Applying the above principles and taking into account the fact that the defendants failed to appear before this Court despite service, the plaintiff is found entitled to damages of a sum of Rs. 2,00,000/-.

31. The plaintiff shall be entitled to a decree as to costs as well.

RELIEF

32. Accordingly, a decree of permanent injunction in terms of the prayers mentioned in paragraph 69 (i) to (vi) and (viii) of the Plaint is passed in favour of the plaintiff and against the defendants.

33. Damages of Rs. 2,00,000/- are granted in favour of the plaintiff and against the defendants. The plaintiff is also entitled to the costs of the suit.

34. Let a decree-sheet be drawn accordingly.

NAVIN CHAWLA, J.

NOVEMBER 22, 2022/DJ