

MS Veena and

ADDL. DISTRICT JUDGE-04
Court Room No. 10, Lock Up Building
Patiala House Courts, New Delhi-110001

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**IN THE COURT OF MS. VEENA RANI :ADDL. DISTRICT JUDGE, NEW
DELHI DISTRICT, PATIALA HOUSE COURTS, NEW DELHI**

TM No.108/2017

Title :Aditya Birla Retail Limited Vs. BeGud Beverages Private Limited

25-05-2017

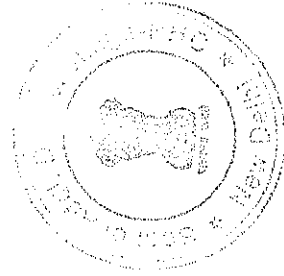
Present: Sh. Sachin Gupta, Id. Counsel for the plaintiff.

ORDER

- 1) By way of the present order the application of the plaintiff under Order 26 Rule 9 and ORDER 39 Rule 7 CPC wherein the plaintiff has sought appointment of the Local Commissioners. Another application under Order XXXIX Rules 1 & 2 CPC r/w S.151 CPC has also been filed wherein the interim order of injunction is sought against the directors, assignees in business, licensees, franchisee, distributors and dealers, from manufacturing, selling , offering for sale, advertising, directly or indirectly dealing in / label packaged drinking water or for any other goods/services under the impugned mark **“MORE”** or any other Trade Mark / label as may be deceptively similar to the plaintiff's trade mark **“MORE”** label.
- 2) The plaintiff has filed the present suit against the impugned adoption and dishonest use of the mark and domain name, namely **“MORE”** and www.morewatersindia.com for packaged drinking water which is identical to the plaintiff's registered trade mark **“MORE”** (label) with respect to the packaged drinking water falling in class 32. The adoption of the impugned mark by the defendant amounts to infringement TRADE MARK, PASSING OFF apart from acts of unfair competition making the defendant liable for interalia injunction, cost and damages.

- 3) The plaintiff has filed the accompanying suit thereby seeking a decree of permanent injunction to restrain infringement / passing off/ delivery up/ rendition of accounts etc. Prayer has also been sought to restrain the defendant the from using/selling/storing / dealing in any manner the impugned trademark

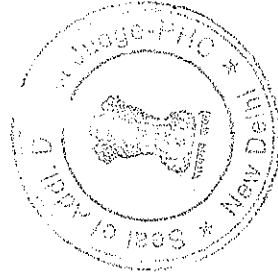
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“**MORE**” or any other mark, word or label identical to or deceptively similar to the plaintiff’s trademark/label “**MORE**” . Other connected reliefs are also sought.

- 4) The plaintiff namely ADITYA BIRLA GROUP RETAIL LIMITED is company incorporated under the Companies Act, 2013 having its registered office at Skyline Icon, 86/92, 5th and 6th Floor, Near Mittal Industrial Estate, Andheri Kurla Road, Andheri (East) Mumbai 400059. This company is the retail arm of Aditya Birla Group which is the country’s first global corporation having its presence felt in almost 25 countries, that ventured into the food and grocery retail sector in the year 2007. The 575 retail stores equally scattered in all parts of the country are famously known by the name of ‘**MORE**’ and cater to the daily, weekly and monthly shopping needs of consumers belonging to various demographics & psychographics. With quality products being the primary importance, this segment of the company boasts of having employee strength of over 11,000 people and functions with an objective to providing quality products at attractive prices to each of its customers.
- 5) The plaintiff has 'Quality 1st' as its motto, and is the first ever Indian food and grocery retailer to receive the FSMS (Food Safety Management System) certification. It has received this Certification for ensuring that the manufacture, storage, distribution and sale of food adheres to the highest quality standards. The Aditya Birla Science and Technology Centre in Talaja drives the quest for world-class quality through extensive research and development across food and non-food categories.
- 6) The plaintiff company operates 494 supermarkets across the country including Delhi and NCR under the trade mark name / label “**MORE**” offering a wide range of fresh fruits and vegetables, groceries, personal care, home care, general merchandise etc. Offering an irresistible combination of quality and value. In addition, the plaintiff’s other brands across categories include **Prarthana, More Choice, More Daily, More Life, Bluearth, Karinee, Kruff, Incheels, TRU, Chatter Kids and Yo**. ABRL aspires for our range of brands to be a customer’s

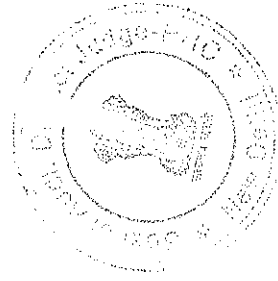
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most preferred brand across product categories.

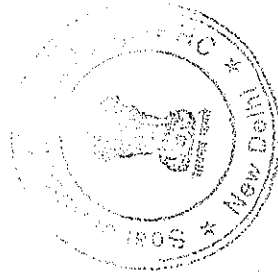
- 7) The plaintiff also avers that **their more.MEGASTORE** is a one-stop shopping destination for the entire family. There are currently 20 hypermarkets in operation and you can find a large range of products across fruits and vegetables, groceries, Fresh items(Bakery, Dairy & Frozen), FMCG products, general merchandise, apparels, consumer durables and IT goods.
- 8) The plaintiff also operates the website [www.morestore .com](http://www.morestore.com) domain name registration of which was obtained by the plaintiff in the year 2004. The plaintiff has averred to have spent crores and cores to promote its trade mark/label / trade name "MORE". The same has been mentioned in paragraph no.9 of the plaint.
- 9) The plaintiff is the proprietor of the trade mark **MORE** and **MORE** formative trademark / labels in relation to the aforesaid goods. The word **MORE** written in English and /or Hindi and / or other vernacular language forms essential part of the said trademark / labels of the plaintiff. The word **MORE** is also forming material part of the plaintiff's trademark name and the same is HOUSE MARK of the plaintiff. The said trademark is being used by the plaintiff uninterruptedly. The earliest registration of the trademark of the plaintiff was in 1980. The details of registration are elaborated in paragraph 5 of the plaint. The plaintiff has earned tremendous goodwill and enviable reputation in the market. The turnover of the plaintiff is elaborated in paragraph 7 of the plaint. The plaintiff's trademark / label **MORE** and formative trademarks are original artistic works and the plaintiff is its owner and proprietor copyright therein within the meaning of Indian Copyright Act 195. The general public is well aware of the said name trademark its goodwill/reputation (s.2(1)(zg) of the Trade Mark Act. The plaintiff's trademark has become distinctive, associated and acquired secondary significance with the plaintiff and its business. The said trademark is the most valuable asset for the plaintiff and has even received many prestigious awards for excellence in quality and business etc.

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- 10) The defendant namely BeGud Beverages Private Limited is a company registered under the Companies Act, 2013 having its registered office at Tin Shed No.10, Khasra No. 287, 288-1, 288-2, Dhan Mill Compound, Village Chhattarpur, New Delhi-110074. The defendant has dishonestly adopted the impugned Trade Mark / Label "MORE" and domain name www.morewatersindia.com for selling its packaged drinking water in the Connaught Place within the jurisdiction of New Delhi area.
- 11) The defendant has adopted whole of the plaintiff's trade mark "MORE" which is structurally and phonetically identical to the plaintiff's trade mark / label "MORE" and is being used for selling identical product i.e. packaged drinking water.
- 12) The impugned trademark as used by the defendant is identical with and similar to the plaintiff's trademark/label in each and every respect including phonetically, visually, structurally, in its basic idea, color combination and in its essential feature. The defendant is wrongly using all kinds of dales description on its impugned goods and is wrongly conveying to the general public / consumer that the impugned goods are coming from the source and origin of the plaintiff. The said adoption is violating the plaintiff's trademark right and is also a case of passing off. The said act of the defendant has been done dishonestly, fraudulently out of greed and with a view to take advantage of the reputation etc.
- 13) The plaintiff has stated that it has come to the knowledge of the plaintiff that huge quantities of the impugned product are lying stocked in the premises of the defendant and the same would be released in the market which would cause great loss to the plaintiff because the unwary consumers would consume the same in the name of the plaintiff. Therefore it would be necessary that local commissioners are appointed.
- 14) It was held by the Hon'ble Supreme Court in the case of 'Laxmikant V. Patel vs. Chetanbhat Shah & Anr.' 2002(24) PTC 1(SC), that once a case of passing off is made out, the practice is generally to grant a prompt ex-parte injunction followed by appointment of Local Commissioner, if necessary.

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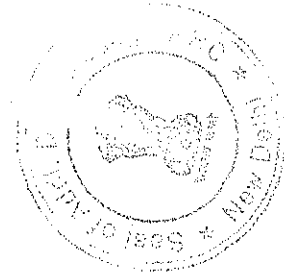
15) In the case of 'CISACO Technologies vs. Shrikanth' 2005(31) PTC 538(Del.), the Hon'ble High Court had granted an ex-parte interim injunction where prima facie, the defendant had copied the product and trade name of the plaintiff. It was held that the delay occasioned by putting the defendant to prior notice was likely to defeat the purpose of injunction. The defendant may remove or further put in market the infringing products, which had been produced by it, if the ex-parte interim injunction was not granted.

16) According to Kerly's Law of Trade Marks and Trade Names (9th Edition Paragraph 838): "Two marks, when placed side by side, may exhibit many and various differences, yet the main idea left on the mind by both may be the same. A person acquainted with one mark, and not having the two side by side for comparison, might well be deceived, if the goods were allowed to be impressed with the second mark, into a belief that he was dealing with goods which bore the same mark as that with which he was acquainted. Thus, for example, a mark may represent a game of football; another mark may show players in a different dress, and in very different positions, and yet the idea conveyed by each might be simply a game of football. It would be too much to expect that persons dealing with trademarked goods, and relying, as they frequently do, upon marks, should be able to remember the exact details of the marks upon the goods with which they are in the habit of dealing. Marks are remembered rather by general impressions or by some significant detail than by any photographic recollection of the whole. Moreover, variations in detail might well be supposed by customers to have been made by the owners of the trade mark they are already acquainted with for reasons of their own.

17) In *Midas Hygiene Industries P. Ltd. ... vs Sudhir Bhatia* reported in 2004 (73) DRJ 647, 2004 (2) SCALE 231, (2004) 3 SCC 90 it has been held by the Hon'ble Supreme Court:

"5. The law on the subject is well settled. In cases of infringement either of Trade Mark or of Copyright normally an injunction must follow. Mere delay in bringing action is not sufficient to defeat grant of injunction in

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such cases. The grant of injunction also becomes necessary if it prima facie appears that the adoption of the Mark was itself dishonest.”

18) In Bimal Govindji Shah vs Panna Lal Chandu Lal reported in 1997 IIIAD Delhi 771, 1997 (2) ARBLR 76 Delhi, 67 (1997) DLT 65 it was held :

“(8) Under Section 28(1) of the Trade and Merchandise Marks Act (hereinafter called the Act) registration of a trade mark gives to the registered proprietor thereof exclusive right to use the same in relation to the goods in respect of which it has been registered. Accordingly, in the present case in terms of the aforesaid provision the defendant being the registered proprietor of the trade mark Flora in respect of hardware goods could claim to have the exclusive right to use the same in relation to hardware goods in respect of which it is registered. But when the opening words of Section 28(1) are noticed which opens with the expression "subject to other provisions" it is crystal clear that the aforesaid right conferred on a registered proprietor is not an absolute right as the same is made subject to other provisions of the Act. The aforesaid view is fortified by the provisions of Section 27(2) of the Act which provides that "nothing in this Act shall be deemed to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof". Accordingly, it is manifestly clear that Section 28 of the Act and other provisions come within the over-riding effect of Section 27(2) of the Act. Similarly, the provisions of Section 33 of the Act also saves vested right of a prior user when it lays down that "nothing in the Act shall entitle the proprietor or a registered user of a registered trade mark to interfere with or restrain the use by any person of a trade mark identical with or nearly resembling it in relation to goods in relation to which that person or a predecessor in title of his has continuously used that trade mark from a prior date". THUS a conjoint reading of the aforesaid provisions persuaded me to conclude on a reading of the aforesaid provisions conjointly the natural deduction is that the right conferred by Section 28(1) of the Act in favour of a registered proprietor of a trade mark is not an

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absolute right but is subject to the other provisions of the Act namely - Sections 27(2) and 33. It is also to be noted that neither Section 28 nor any other provision of the Act prohibits an action for passing off by an anterior user of a trade mark against a registered user of the same. In other words registration of a trade mark does not provide a defense to the proceedings for passing off as provided for under Section 27(2) of the Act. A prior user of a trade mark is entitled to maintain an action against a subsequent user of identical trade mark including registered user thereof."

19) The Hon'ble Supreme Court, on appeal, while upholding the decision of the Delhi High Court, in *N.R. DONGRE v. WHIRLPOOL CORPORATION* (1996 PTC (16) 583) held as under:

"The mark/name 'WHIRLPOOL' is associated for long, much prior to the defendants' application in 1986 with the Whirlpool corporation plaintiff No.1. In view of the prior user of the mark by plaintiff No.1 and its trans-border reputation extending to India, the trade mark WHIRLPOOL gives an indication of the origin of the goods as emanating from or relating to the Whirlpool Corporation plaintiff No.1. The High Court has recorded its satisfaction that use of the WHIRLPOOL mark by the defendants indicates prima facie an intention to pass off defendants' washing machines as those of plaintiffs' or at least the likelihood of the buyers being confused or misled into that belief. The fact that the cost of defendants' washing machine is 1/3rd of the cost of the plaintiffs' washing machine as stated by Shri Sibal, itself supports the plaintiffs' plea that the defendants' washing machines are not of the same engineering standard and are inferior in quality to the washing machines of the plaintiffs'."

20) In *Ruston & Hornsby Ltd. Vs. The Zamindara Engineering Co.* (1969) 2 SCC 727 it has been held :

"7. In an action for infringement where the defendant's trade mark is identical with the plaintiff's mark, the Court will not enquire whether the

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infringement is such as is likely to deceive or cause confusion. But where the alleged infringement consists of using not the exact mark on the register, but something similar to it, the test of infringement is the same as in an action for passing-off. In other words, the test as to likelihood of confusion or deception arising from similarity of marks is the same both in infringement and passing-off actions."

21) In a concurring opinion of Lord Jauncey of Tullichettle in the same decision, it was observed:

"However, it is a prerequisite of any successful passing off action that the plaintiff's goods have acquired a reputation in the market and are known by some distinguishing feature. It is also a prerequisite that the misrepresentation has deceived or is likely to deceive and that the plaintiff is likely to suffer damage by such deception. Mere confusion which does not lead to a sale is not sufficient. Thus, if a customer asks for a tin of black shoe polish without specifying any brand and is offered the product of A which he mistakenly believes to be that of B, he may be confused as to what he has got but he has not been deceived into getting it. Misrepresentation has played no part in his purchase."

22) Where the product is an eatable like a biscuit, the colour and 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. The aspect of 'initial interest' was explained in Baker Hughes Limited v. Hiroo Khushalani 2000 102 CompCas 203 Delhi, 74 (1998) DLT 715, ILR 1999 Delhi 41 as under:

"In some case, however, it is also 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."

23) In Consorzio Del Prosciutto Di Parma Vs. Marks & Spencer Plc and Others,

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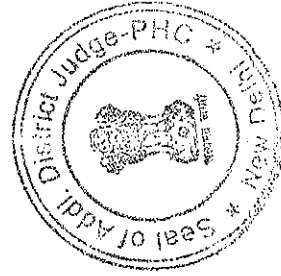


[1991] RPC (15) 351 (at pages 368-369), Nourse, L.J., took into account the dicta of the Courts, including the speeches of Lord Diplock and Lord Fraser of Tullybelton in *Warnink Vs. Townend* (supra), in each of which five ingredients for invoking the tort of passing off are identified, the ingredients not being the same in each case. However, Nourse, L.J. was of the opinion that five ingredients given by each of the two law lords do not give the same degree of assistance in analysis and decision as the classical trinity of elements to prove the tort of passing off, namely, (1) a reputation of goodwill acquired by the plaintiff in his goods, name, mark, etc., (2) a misrepresentation by the defendant leading to the confusion, or deception (3) causing damage to the plaintiff.

24) It will be in the interest of justice to grant ex-parte stay at this stage. In view of the facts and circumstances of the case, I am of the opinion that if the ex-parte ad-interim injunction is not granted, the plaintiff would be put to irreparable loss not only in money but also loss of goodwill and reputation. An ex-parte ad-interim injunction is thus, granted to the plaintiff and the defendant, its directors, its assignees in business, its distributors, dealers, stockists, retailers, servants and agents from manufacturing, selling offering for sale, advertising, directly or indirectly dealing in packaged drinking water or for any other goods/services under the impugned trade mark/label **MORE** or domain name www.morewaterindia.com or any other trade mark/label/domain name as may be deceptively similar to the Plaintiff's trade mark/Label **MORE** amounting to infringement of plaintiff's registered trade mark/label **MORE** under No. 1639636 and or amounting to passing off its business as those of the plaintiff till further orders. The plaintiff to comply with order 39 Rule 3 CPC.

25) The present application is filed by the plaintiff seeking appointment of Local Commissioner to visit the premises of the defendants. For the reasons above-mentioned, the application under Order 26 rule 9 CPC is also allowed. The defendant is further restrained from using the domain name www.morewaterindia for any purpose to which touches upon the business of the plaintiff in any way directly / indirectly. The present order is effective the moment the Ld. Local commissioner visits the above-said premises. The

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compliance of order 39 Rule 3 CPC may also be done through the said Ld. Local commissioner.

26) Accordingly **Sh. Dinesh Sharma, Adv. (M): 9313358665; 9910169186 (J4/40, House No. B-15, Khirki Extension, Malviya Nagar, New Delhi-110017)** is appointed Local Commissioner in respect of **BeGud Beverages Private Limited, Registered office at Tin Shed No.10, Khasra No. 287, 288-1, 288-2, Dhan Mill Compound, Village Chhattarpur, New Delhi-110074.** The fees of the said Local Commissioner is fixed as **Rs.85,000/- (Rupees Eighty Five Thousand only)**. All the other miscellaneous expenses such as travel etc. to be borne by the plaintiff.

27) The Local commissioner appointed-herein are directed to :

- a. Visit and search the premises i.e. **BeGud Beverages Private Limited, Registered office at Tin Shed No.10, Khasra No. 287, 288-1, 288-2, Dhan Mill Compound, Village Chhattarpur, New Delhi-110074.**
- b. (along-with the representatives of the plaintiff) for the impugned infringing goods.
- c. Search & Seize all infringing goods including other incriminating material like promotional material, stationary, packing promotional material, dyes, blocks etc. unfinished, unpacked impugned goods, wrappers etc. bearing impugned trademark/ label trade dress **"MORE"** and / or any other allied products of the plaintiff being deceptively or confusingly similar to the trade dress and get-up of the products **"MORE"**.
- d. To prepare inventory of the seized goods as above-mentioned;
- e. To sign the ledger books, cash books, account books etc. of the defendants containing any entry relevant to the dispute;
- f. To take adequate photographs, videography etc. to record the

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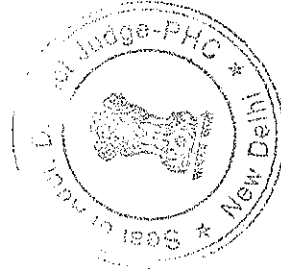


proceedings of the commission;

- g. To take the above-said infringing goods into custody. The Ld. Local Commissioner may handover the seized goods to the defendant or his representative present there to after a 'supurdari-nama' being furnished by the said defendant/representative with an undertaking to produce the seized goods as and when required during the court-proceedings.
- h. Police assistance / aid to be sought through the SHO concerned. The concerned SHO is expected to promptly provide sufficient police force to ensure the safety of the Ld. Local Commissioner and the team accompanying. It is further expected that the Ld. Local Commissioner is not made to run from pillar to post to seek police assistance as this would lead to the wastage of valuable time.
- i. To visit/ inspect/ search / seize any other premises as disclosed by the defendant / representative on a declaration by the said defendant etc. whether any such other premises is within his knowledge where the impugned goods are stocked / stored.
- j. To break open the lock if the premises is found locked and none is present from the defendant's side or the defendant is deliberately avoiding presence.

28) . The application is disposed of.

29) The Local Commissioners shall submit the reports by the next date of hearing i.e. on 3rd July 2017. Meanwhile summons be issued to the defendant on filing of PF, RC & speed post for the next date.



True copy
(Signature)

Sd/
(VEENA RANI)
Additional District Judge-04
PHC, New Delhi/ Judge Code : DL0271
Date:25-05-2017

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