

**(2008) 08 DEL CK 0190**

**Delhi High Court**

**Case No:** CS (OS) No. 578 of 2005

S.K. Industries Pvt. Ltd.

APPELLANT

Vs

Rite Foods Product (P) Ltd. and  
Others

RESPONDENT

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**Date of Decision:** Aug. 4, 2008

**Citation:** (2008) 38 PTC 200

**Hon'ble Judges:** Hima Kohli, J

**Bench:** Single Bench

**Advocate:** N. Sharma and P.K. Yadav, for the Appellant; None, for the Respondent

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### **Judgement**

Hima Kohli, J.

The plaintiff has instituted the present suit on 20th April, 2005 against the defendants praying inter alia for a decree of permanent injunction restraining the defendants from infringing the design of the plaintiff with respect to Duck jars described in detail in paras 9 and 10 of the plaint. The defendants No.1 to 3 are based in Madhya Pradesh and the defendants No.4 and 5 are based in Haryana. Appearance was entered on behalf of the defendants on 18th May, 2005, whereafter the defendants approached the plaintiff for settling their inter se disputes. However, after some time, the defendants stopped appearing in the matter. As a result, they were proceeded against ex-parte, vide order dated 26th July, 2006, and the plaintiff was directed to file its ex-parte evidence by way of affidavit thereafter. Needful was done by the plaintiff who filed the evidence of Mr. Dinesh Bhadoria by way of an affidavit.

2. The brief facts of the present case are that the plaintiff is a company registered at Delhi and is engaged in manufacturing, selling, distributing and marketing confectionery items under the trademark, "MAHAK" which is registered in its favour under the Trademarks Act, 1958. The plaintiff has instituted the present suit through Mr. Dinesh Singh Bhadoria, the authorized representative of the company, in whose favour, the Board of Directors have passed a resolution dated 5th April, 2005

authorizing him to file, sign, verify and institute the suits/legal proceedings for protecting the company's design and copyright of the packaging items. The extract of the Board Resolution is placed on the record and marked as Ex.PW-1/1.

3. The defendant No.1 is stated to be the company registered under the Companies Act, 1956 and having its place of business at Madhya Pradesh. The defendant No.2 is stated to be the sister concern of the defendant No.1. Both the defendants are in the trade of manufacturing confectionery items. The defendant No.3 is the stockiest of the defendants No.1 & 2. The defendant No.4 is stated to be manufacturing the impugned containers/jars for and on behalf of the defendants No.1 & 2. The defendant No.5 is the proprietor of the defendant No.4.

4. Counsel for the plaintiff states that apart from confectionery items, the plaintiff has also diversified in other businesses including tobacco products, mouth-freshners, etc. The present suit is however, confined to the Duck shaped containers in which the plaintiff claims ownership under the Designs Act. The registration number granted to the plaintiff for the said design is 189638 and the same is dated 1.8.2002. Counsel for the plaintiff submits that the plaintiff is the owner of the said design as indicated in Ex.PW 1/2, which is a photocopy of the certificate of the Registration of Design in favour of the plaintiff in respect of the container, photocopy of which is enclosed along with the certificate.

5. Counsel for the plaintiff submits that the plaintiff is selling its products under the trademark, "MAHAK" and is marketing and selling its product "MAHAK FRUGURT" in a comic shaped jar comprising of unique representation of a duck jar which has unique features, as it bears a pair of eyes, wings and a protruding beak. The jar is specially designed to be placed on a pair of legs. The upper end of the jar is open and the lid is designed in a form of a hat.

6. Counsel for the plaintiff submits that the collective turnover of the plaintiff for the period from the years 2000 to 2004, is Rs. 72,24,377,523.04 (Ex.PW1/3). He further submits that the plaintiff has spent over Rs. 26.00 lakhs in advertising its products including the registered design in the impugned container, during the year 2003. The plaintiff has enclosed as Exhibits PW-1/4 & 1/6, certificates issued by its Chartered Accountant for the financial years 2000 to 2004. Ex.PW1/5 contains the details of the advertisements issued by the plaintiff with regard to its product, "FRUGURT" which is packed and sold in the impugned container, subject matter of the present suit. The bills received by the plaintiff towards the advertisement of its product "FRUGURT" in the impugned jars are enclosed with the documents and marked as Ex.PW-1/7 (collective). Ex.PW- 1/8 is the copy of the certificate issued by the Trademark Registry certifying that the trademark "MAHAK" was registered in favour of the plaintiff in Class 31, on 29th August, 1985 in respect of Betal Spices (Pan Masala).

7. Counsel for the plaintiff submits that the plaintiff came to know in the year 2005 that the defendants were infringing the design of the plaintiff by copying the said Duck Jar design and selling their products therein without seeking prior permission of the plaintiff. He draws the attention of this Court to the photographs of the plaintiff's products marked as Ex. PW-1/9 as against the photographs of the defendants' products marked as Ex.PW-1/10 to state that the defendants have blatantly copied the design of the plaintiff, thus infringing upon the plaintiff's copyright. Aggrieved by the aforesaid illegal acts of the defendants, the plaintiff has instituted the present suit.

8. Counsel for the plaintiff submits that the aforesaid illegal and unauthorized acts of the defendants amount to violation and infringement of the plaintiff's copyright in the aforesaid design and have been done with the malafide intention by exploiting the plaintiff's goodwill and reputation in the market. He states that vide order dated 2nd May, 2005, an ex-parte ad interim injunction was granted in favour of the plaintiff restraining the defendants from selling their confectionery items in jars/containers of the design as shown at Ex.PW-1/9. Simultaneously, Local Commissioners were appointed to visit the premises of the defendants at Madhya Pradesh and Haryana and make inventory of their goods. They were also directed to take into custody the infringing products which were similar to the plaintiff's product.

9. Pursuant to the aforesaid order, the Local Commissioners executed the commissions and filed their reports. The Local Commissioner who visited the premises of the defendant No.4 & 5 filed her report stating inter alia that she had searched the premises of the defendants in the course of which only six jars were found out of which one was badly mutilated. The caps, feet, beaks and eyes which were the accessories of the duck jar were however found in different assorted colours and in large bags. The same were also inventorized. Two dyes/moulds were also found in the premises and were included in the inventory. Similarly, a report was filed by the Local Commissioner who visited the premises of the defendant No.2. He found only one jar similar to the plaintiff's jar. The Local Commissioner also visited the premises of the defendant No.3 who stated that some months ago, they had received one carton having 25 to 30 jars from the defendant No. 2, but the same were returned to the defendant No.2 as the goods were defective. As far as the defendant No.1 is concerned, the Local Commissioner reiterated that despite search made at the premises, no such company was found located at the address given in the order dated 2.5.2005.

10. Counsel for the plaintiff states that in the aforesaid circumstances, the plaintiff is entitled to the relief as prayed for in the plaint.

11. A perusal of the impugned Duck Jar design clearly shows that the defendants have copied not only the shape of the jar, but also the accessories including the head, beak, eyes and the legs as shown in the design marked as Ex.PW-1/9. This

apart, the placement of the sticker in the front of the container has also been copied by the defendants. The present case is not a case of infringement of trademark, but it is certainly a case of infringement of the copyright in the design of the plaintiff who is the registered owner of the Duck shaped containers. The affidavit of the witness exhibited as Ex.PW-1A fully supports the case of the plaintiff and clearly makes out a case of infringement of copyright and design of the plaintiff and that of passing off for the reason that the defendants are attempting to sell their confectionary items as if they belong to the plaintiff. The evidence as adduced by the plaintiff remains unrebutted and there is no reason for this Court to disbelieve the same.

12. Once it is proved that there is infringement of the copyright in the design of the carton belonging to the plaintiff, and the action of the defendants is intentional, dishonest and intended to trade on the goodwill of the plaintiff, the plaintiff would be entitled to injunction. The aforesaid principles have been reiterated time and again in various judicial pronouncements, including the following:

(i) [Anglo-Dutch, Colour and Varnish Works Private Limited Vs. India Trading House,](#)

(ii) Burroughs Welcom (India) Ltd.v. Uni-Sole Pvt. Ltd. and Anr. 1999 PTC (19) 188

(iii) [Laxmikant V. Patel Vs. Chetanbhat Shah and Another,](#)

(iv) Hindustan Pencils Ltd. v. Vipin Trading Company 125 (2005) DLT 596

13. The principles laid down in the aforesaid judgments are squarely applicable to the facts and circumstances of the present case. The plaintiff has led positive evidence to show its investments, advertisements, turnover and quality of goods. The defendants have not been assigned any right of interest by the plaintiff to use its design and get up of the Duck jars cartons used for the sale of its confectionary item "FRUGURT". Hence, the contention of the plaintiff has to be accepted that the defendants have intentionally infringed upon legal rights of the plaintiff even under the common law.

14. As far as relief of rendition of accounts is concerned, the affidavit of the witness is silent. There are no specific averments made in the plaint in this regard and in any case in the course of the arguments, counsel for the plaintiff has not seriously pressed for the grant of relief of rendition of accounts.

15. For the reasons stated above, a decree of permanent injunction is passed in favour of the plaintiff and against the defendants restraining them from manufacturing, offering for sale, marketing, advertising, distributing or dealing in the impugned Duck shaped container (Ex. PW-1/10) which is deceptively similar to the plaintiff's container (Ex.PW-1/9) on the record. The plaintiff shall also be entitled to costs.