

## **The Coca Cola Company and Another Vs Dwarkadhish Khandelwal Trading As Mewar Soda Water Factory**

**Court:** Delhi High Court

**Date of Decision:** Aug. 24, 2007

**Hon'ble Judges:** Sanjay Kishan Kaul, J

**Bench:** Single Bench

**Advocate:** C.M. Lall, Manish Dhir and Shikha Sachdev, for the Appellant; Ex parte, for the Respondent

### **Judgement**

Sanjay Kishan Kaul, J.

The plaintiffs have filed a suit for injunction and damages for infringement of their trademark FANTA on account of a deceptively similar trademark FACTA, which is being used by the defendant in identical scheme.

2. The plaintiff No. 1 claims to be a world renowned company and proprietor of various trademarks including, COCA COLA, COKE, THUMS

UP, FANTA, etc. The trademark FANTA is stated to be adopted since 1941 and the turnover runs into millions of dollars, the details of which

have been set out in the plaint. The trademark FANTA is also registered under different classes as stated in paragraph 12 of the plaint.

3. The plaintiffs came across a general advertisement of the defendant's trademark FACTA on 18.11.2003, which was deceptively and

confusingly similar to the trademark of the plaintiffs. plaintiff No. 1 filed a notice of opposition before the Registrar of Trade Marks.

4. It is the case of the plaintiffs that the adoption of the trademark FACTA by the defendant is in respect of similar aerated drink and is a deliberate

attempt of the defendant to ride piggy back on the reputation and goodwill of the plaintiffs.

5. The plaintiffs have, thus, sought a decree of permanent and mandatory injunction, delivery up and rendition of accounts. The claim for damages

was tentatively valued at Rs. 20.00 lakh. 6. The summons and notices were issued to the defendant, who entered appearance but thereafter did not

file the written statement and stopped appearing. The defendant was proceeded ex parte vide order dated 25.5.2007.

7. The plaintiffs, in order to establish their case, have filed the affidavit of Mr. Ullal Narendra Kini (PW-1) as exhibit PW-1/A affirming to the facts

set out in the plaint. The letter of authorisation in his favor has been exhibited as Exhibit PW-1/1.

8. The said witness has proved the certified copy of the Board Resolution dated 14.8.2006 of plaintiff No. 2 in favor of Mr. Joel Allan Peres. Mr.

Joel Allan Peres has signed and verified the plaint and instituted the suit. A letter of authorisation by the Vice-President (Legal) of plaintiff No. 2 in

favor of the deponent has been proved as PW-1/1. The delegation in favor of Mr. Steve Whaley, who has signed and verified the plaint and

instituted the suit on behalf of plaintiff No. 1, has been proved in pursuance to the delegation dated 9.5.2006 (Exhibit PW-1/2).

9. The witness has deposed to the facts set out in the plaint and has proved the annual reports of the years 2003 to 2005 as Exhibit PW-1/5. The

registration of the trademarks in favor of plaintiff No. 1 under different categories, which has been renewed from time to time, has been proved

through the journal advertisements of these marks as Exhibit PW-1/8 collectively. The office copy of TM-46 has been proved as Exhibit PW-1/9.

10. The documents on record also show that the style of the label is similar. The word FANTA and FACTA are liable to cause deception in view

of their similarity. It cannot be lost sight of that these aerated drinks are purchased by the public at large including children, who may not be well

educated and thus the chances of deception are even higher.

11. In view of the aforesaid, I am satisfied that the adoption of the mark FACTA, which appears to have no meaning, when there is an existing

trademark FANTA of the plaintiff is not bonafide and the object appears to deceive the public into purchasing the product of the defendant on the

assumption that the same may emanate from the plaintiffs. The object is, thus, to ride piggy back on the reputation of the plaintiffs.

12. The defendant after initial appearance has not even cared to defend the present suit.

13. A decree is, thus, liable to be passed in favor of the plaintiffs and against the defendant in terms of prayer Clauses "A" and "B" of the plaint.

14. Insofar as prayer Clause "C" is concerned, this Court has repeatedly held that the party, which absents itself from the court proceedings should

not be able to avoid the rigours of damages as that would amount to giving an escape route to such absenting parties from the proceedings

especially when compared to parties which joins the proceedings. It would be suffice to reproduce the observations made by this Court in Asian

Paints (India) Ltd. Vs. Balaji Paints and Chemicals and Others, which are as under:

11. Learned Counsel for the plaintiff states that apart from the relief claimed for in paras (a) to (d) of para 33 of the plaint, the plaintiff is also

entitled to damages. In this behalf, learned Counsel has relied upon the judgments of this Court in Relaxo Rubber Limited and Anr. v. Selection

Footwear and Anr. 1999 (19) PTC 578, Hindustan Machines v. Royal Electrical Appliances 1999 (19) PTC 685 and CS (OS) 2711/1999 L.T.

Overseas Ltd. v. Guruji Trading Co. and Anr. decided on 7.9.2003. In all these cases, damages of Rs. 3 lakhs were awarded in favor of the

plaintiff. In Time Incorporated Vs. Lokesh Srivastava and Another, 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. Vs. Shree

Assuramji Scooters, 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 appeared 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 endeavor should be made for a

larger public purpose to discourage such parties from indulging in acts of deception.

15. In view of the aforesaid, I deem it appropriate that the plaintiffs should be held entitled to damages to the tune of Rs. 5.00 lakh apart from the

costs of the present proceedings.

16. A decree is passed in favor of the plaintiffs and against the defendant in terms of prayer Clauses "A" and "B" of the plaint. The plaintiffs are

further entitled to damages of Rs. 5.00 lakh and shall also be entitled to costs of the proceedings.

17. The decree sheet be drawn up accordingly.