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

Reserved on: 31st July, 2023

Date of decision: 6th September, 2023

+ **C.O.(COMM.IPD-CR) 715/2022**

MANJU SINGAL PROPRIETOR SINGLA FOOD
PRODUCTS

..... Petitioner

Through: Mr. Ajay Amitabh Suman, Mr.
Mankaran Singh & Mr. Risabh
Gupta, Advocates instructed by Mr.
S K. Bansal, Advocate.

versus

DEEPAK KUMAR, DEEPAK MANOCHA, SARA SALES AND
ANR.

..... Respondents

Through: Ms. Nidhi Raman CGSC with Mr.
Zubin Singh, Advocate for R-2. (M:
9891088658)

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. This judgment has been pronounced through hybrid mode.

Background

2. The present petition is of the year 2020. It was originally filed before the Intellectual Property Appellate Board (IPAB) and transferred to this Court upon the enactment of the Tribunals Reforms Act, 2021.

3. The Petitioner- Manju Singal Proprietor Singla Food Products has filed this petition under Section 50 of the Copyright Act, 1957 (*hereinafter 'the Act'*) seeking rectification of the Registration of the Copyright bearing No. 128962/2019 (*hereinafter 'impugned registration'*). The impugned registration has been obtained by the Respondent No. 1- Mr. Deepak Kumar @ Deepak Manocha. It is the claim of the Petitioner that it is an earlier



creator of a similar artwork which is almost identical to that of impugned registration of the Respondent No. 1.

4. Vide order dated 15th September, 2020, notice was issued in this Petition by the IPAB and while taking a *prima facie* view, the IPAB ordered a stay on the operation of the impugned registration. Upon transfer to this Court, this matter was first listed before the Joint Registrar on 18th July, 2022, wherein both the Petitioner and the Respondent No. 1 appeared. Notice was also issued by the Court on 16th January, 2023 and thereafter, in view of the continuous non-appearance of the Respondent No.1, even after service, Respondent No. 1 is proceeded *ex parte*.

Brief Facts

5. The Petitioner is in the business of manufacturing, marketing and selling snack food products, confectionery and other namkeen edible products under the mark 'GULCHHARE'. The said mark is stated to have been adopted by the Petitioner in 2009. Along with the said mark the Petitioner also created an artistic artwork and packaging for the mark which has been used since 2009. The said artwork which was adopted by the Petitioner, along with the mark 'GULCHHARE' is set out below:



Signature Not Verified

Digitally Signed
By:DHIRENDER KUMAR
Signing Date:06.09.2023
18:34:17

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Submissions

6. The Petitioner claims ownership of the said artistic artwork on the ground that the said artwork was created by the artist at the instance of the Petitioner on payment of valuable consideration. The Petitioner's artwork is also registered under the Copyright Act, 1957 and the same is bearing no. A-112378/2014. In addition, the Petitioner asserts that it has been dealing with the said artwork in the course of trade, in relation to its goods and business, within the meaning of Section 14 of the Copyright Act, 1957.

7. The Petitioner claims to have achieved a total sales turnover of over Rs. 7 crores for the year 2019-2020 and asserts that it possesses all the necessary statutory licenses to conduct business all over the country. The Petitioner claims that it is aggrieved by the impugned registration of the artwork 'GOORCHARRE' by Respondent No. 1, on the ground that the said registration is for an identical artwork, using the same combination of colours and also artistic style of writing. The Petitioner also submits that vide order dated 3rd October, 2020, a Id. District Judge of the Commercial Court Saket in *CS(COMM) 241/2020* titled *Manju Singal, Proprietor M/s Singla Food Products v. Deepak Kumar @ Deepak Manocha & Anr.*, has already issued an injunction against Respondent No. 1 regarding the use of the marks 'GOORCHARRE' and 'ALADIN KA KHANA KHAJANA,' or any other deceptively similar marks. Id. Counsel for the Petitioner also submits that the said injunction issued by the Commercial Court, Saket, Delhi is still in force. Prior to the filing of the said suit, the Plaintiff had also filed a suit before the District Judge, Hisar, Haryana, which was dismissed as withdrawn, with liberty granted to file a fresh suit before the competent Court.



Analysis and Findings

8. The Court has heard Id. Counsel for the Petitioner and perused the record. The Petitioner's copyright registration application was filed on 24th April, 2014 for the artistic work titled 'GULCHHARE' for the product *mast sevia*n. The said application was granted on 7th November, 2014, vide Registration No. A-112378/2014 claiming first publication in the year 2009. The extract from the Register of Copyrights is also on record with the said information. The impugned registration of the Respondent No. 1 on the other hand has been granted on 29th April, 2019 vide application no. A-128962/2019 for the published work titled 'GOORCHARREY LABEL'. A comparative table of the artistic works of the Petitioner and the Respondent No. 1 is set out below:

| Plaintiff's artistic work | Respondent No. 1's artistic work |
|---|--|
|  |  |



9. The expression ‘GULCHHARE’ in Hindi has a connotation of enjoyment, *mauj masti*, etc. It could in some context also have negative connotation. However, insofar as the Petitioner’s product’s packaging and use of the mark is concerned, the product is also targeted at children, it may be used to depict *masti* and enjoyment while consuming *sevian* i.e., namkeen. Some of the cartoon characters used on the packaging, however, may not belong to the Petitioner, but in the present case, the Court is not concerned with misuse of any known cartoon characters at the instance of the owner of such characters. The Court is seized with the disputes between the Petitioner and the Respondent No. 1 in respect of use of similar artistic work and packaging.

10. In terms of the judgements in *Disney Enterprises Inc. & Anr. v. Balraj Muttneja and Ors., 210 (2014) DLT 381* and *S. Oliver Bernd Freier GMBH & CO. KG v. Jaikara Apparels and Ors., 2013 (55) PTC 414 (Del)* there is no compelling reason to direct recording of oral *ex-parte* evidence inasmuch as the facts are not seriously in dispute in this case. The relevant observations from the judgment in *Disney Enterprises Inc. (supra)*, are as under:

“3. Though the defendants entered appearance through their counsel on 01.02.2013 but remained unrepresented thereafter and failed to file a written statement as well. The defendants were thus directed to be proceeded ex-parte vide order dated 04.10.2013 and the plaintiffs permitted to file affidavits by way of ex-parte evidence.

*4. The plaintiffs, despite having been granted sufficient time and several opportunities, have failed to get their affidavits for leading ex-parte evidence on record. **However, it is not deemed expedient to further await***



the same and allow this matter to languish, for the reason that I have in Indian Performing Rights Society Ltd. Vs. Gauhati Town Club MANU/DE/0582/2013 held that where the defendant is ex parte and the material before the Court is sufficient to allow the claim of the plaintiff, the time of the Court should not be wasted in directing ex parte evidence to be recorded and which mostly is nothing buta repetition of the contents of the plaint.”

11. The first publication by the Petitioner- M/s Singla Food Products is mentioned of 2009, which is also recorded in the Register of Copyrights. On the other hand, the copyright registration of the Respondent No. 1 was applied for on 5th February, 2019 and the first publication claimed is of 2016. The Respondent No. 1 in its application for the grant of a copyright registration also claims that its packaging is an original artistic work, which this Court is convinced, it is not, owing to the stark similarity both in the name and in the colour combination, layout, arrangement and artistic features in the two packaging's. The identity/similarity between the two packaging's includes *inter alia* the following features:

- (i) The name 'GULCHHARE' versus 'GURCHARRE';
- (ii) The use of the blue background with a yellow and pink colour combination,
- (iii) Depiction of stars in the background that too at almost the same location,
- (iv) The use of the expression '*mast sevian*';
- (v) The use of coins and currency denominations of the identical value, that too at almost the same location on the label;
- (vi) The use of the word '*inami*' in an oval shaped yellow device;



12. The clear prior creator of the artistic work, in the present case is the Petitioner and the Respondent No. 1 has merely copied all the essential elements the said artistic work. The Petitioner also owns a trademark registration in the word 'GULCHHARE' dating back to 19th March, 2012 in respect of products in Class 30 including snack products, confectionery, etc. The Petitioner had also filed a suit in the District Court, Hisar against the Respondent No. 1 and the same has been withdrawn vide order dated 19th November, 2019. Thereafter, the Plaintiff filed a fresh suit before the Commercial Courts, Saket, i.e., **CS(COMM) 241/2020** titled **Manju Singal, Proprietor M/s Singla Food Products v. Deepak Kumar @ Deepak Manocha & Anr.** in which vide order 3rd October, 2020, the Id. District Judge, has restrained the Respondent No. 1 from use of the mark 'GOORCHARRE' and another mark 'ALADIN KA KHAZANA'. The operative portion of the said order reads as under:

“

Having regard to the legal position and aforementioned facts and circumstances of the case, this court is of the considered view that plaintiff has shown a strong prima facie case and would suffer irreparable injury if injunction is not granted and public would also suffer product being eatable. In view of the aforementioned reasons, defendants by themselves as to through their representatives, distributors, assigns, stockists, dealers, retailers etc and all other acting for and on behalf of the defendants are hereby restrained from manufacturing, marketing, selling and advertising or in any manner dealing with the impugned trademark/label/trade dress GOORCHARRE and ALADIN KA KHANA KHAJANA or any other trademark/device/trade dress deceptively similar to the plaintiff's trademark GULCHHARE and ALADIN KA



KHAJANA in relation to their impugned goods i.e. Namkeen, Confectionery and other edible items and allied and related goods and passing off and enabling others to pass off their goods and business as those of the plaintiff till next date.

13. In the said case, the findings given by the Court while granting the injunction to the Plaintiff were :

- (i) That the Copyright registration of the Defendant for the work titled 'GOORCHARRE' has been stayed by the Copyright Board;
- (ii) That there is no prior registration/use/publication pointed out by the Respondent No. 1;
- (iii) That there is visual similarity on account of similarity of name, packaging, colour combination and get up between the labels of the Plaintiff and the Defendant;
- (iv) The label of the Defendant would confuse gullible customers due to its deceptive similarity with the Plaintiffs product label, especially when both are in the same.

14. The said injunction is continuing as per the submission made by the Id. Counsel for the Petitioner.

15. Under the Copyright Act, 1957, any work which is wrongly entered into the register, can be rectified/expunged at the instance of any person aggrieved. Section 50 of the Act reads as under:

“50. Rectification of Register by High Court.--The High Court, on application of the Registrar of Copyrights or of any person aggrieved, shall order the rectification of the Register of Copyrights by--
(a) the making of any entry wrongly omitted to be made in the register, or



(b) the expunging of any entry wrongly made in, or remaining on, the register, or

(c) the correction of any error or defect in the register.”

16. As per Section 50 of the Act, an application for rectification can be filed either before the Registrar of Copyrights or before the High Court. In fact, the Respondent No. 1’s packaging is nothing but a substantial reproduction of the Plaintiffs packaging as also a colourable imitation of the same. Therefore, considering the fact that the Petitioner’s packaging/label has been imitated by the Respondent No. 1, the Petitioner clearly is a *person aggrieved*. This position has also been affirmed by this Court in judgement dated 20th April, 2018 in *Marico Ltd. vs. Jagit Kaur, 2018 SCC Del 8488* as also by a Coordinate Bench of this Court in judgement dated 1st February, 2022 in *The Polo/Lauren Company LP v. Sandeep Arora & Anr., 2022:DHC:446*.

17. In terms of Section 13(1)(a) of the Act, in order to be capable of getting copyright protection, an artistic work would be required to meet the threshold of originality. However, the fact that the Respondent No. 1’s artistic work is nothing but a substantial imitation of the Petitioner’s work, would show that the same is therefore not an original work. Registration of copyright can be granted only in respect of original works. If any person or entity mis-describes the work as an original work, when it is actually not and is a copy of another work, such registration would be a registration wrongly remaining on the Register of Copyrights.

18. The Petitioner’s counsel has also relied upon the following decisions in support of his assertion that the Respondent No. 1’s artistic work ought to be removed from the Register of Copyrights as the same cannot be



considered as original in light of the Petitioner's artistic work:

| S. No. | Cause Title of the Decision | Citation |
|--------|--|-------------------------|
| 1 | <i>Glaxo Orthopedic U.K. Limited. v. Samrat Pharma</i> | AIR 1984 Delhi 265 |
| 2 | <i>R. G. Anand v. Delux Films</i> | AIR 1978 SC 1613 |
| 3 | <i>Heinz Italia and another v. Dabur India Limited.</i> | (2007) 6 SCC 1 |
| 4 | <i>Cunniah and Co v. Balraj and Co</i> | AIR 1961 Mad 111 |
| 5 | <i>Camlin Private Limited v. National Pencil Industries</i> | (2002) 24 PTC 347 (Del) |
| 6 | <i>Hindustan Lever Limited v. Nirma Private Limited</i> | AIR 1992 Bomb 195 |
| 7 | <i>Hindustan Pencils Limited v. Alpana Cottage Industries Limited.</i> | 2001 (21) PTC 504 (CB) |

While the Id. Counsel for the Petitioner has relied upon the several decisions in the aforementioned list of cases, this Court while analysing the legal position, has confined its analysis to the decisions which are relevant to the facts and circumstances of the present case.

19. In *Heinz Italia (supra)*, the Supreme Court has held that when considering the question of similarity between two packagings, it is the overall effect of the competing packagings that would have to be seen and not the effect of minor/trivial variations. The relevant extract of the said decision is extracted as under:

“18. We have also examined the packaging of the product and specifically Annexure P-6 (colly). Item D of Annexure P-6 is the packaging in dispute. It will be



*seen that the colour scheme of Glucose-D and Glucon-D is almost identical with a happy family superimposed on both. Mr Chandra has however pointed out that in Glucose-D the happy family consisted of four whereas in the case of Glucon-D the family was of three and as such the two were dissimilar. **We are of the opinion however that the colour scheme and the overall effect of the packaging has to be seen.** We have also examined Item D individually which is the exclusive packaging for Glucose-D; the one on the extreme left being the packaging in the year 1989, the one in the middle being the one for the year 2000 (which is impugned in the present suit) and the third on the extreme right which is the subject-matter of the suit in Calcutta which has been stayed on the application made by the respondent. We are of the opinion that the packaging of Glucose-D and Glucon-D is so similar that it can easily confuse a purchaser. We also feel that mere fact that the respondents have time and again made small changes in their packaging is an attempt to continue to mislead the purchaser and to make it more difficult for the appellants to protect their mark, which the record shows has acquired an enviable reputation in the market which is sought to be exploited by the respondent.”*

20. This Court in *Marico (supra)*, has also held that when two labels or artistic works are compared, to determine if they are original, the broad features of both the labels/works are to be compared. It has also been held that colour scheme and objects/items used in the artistic work also are a factor while determining substantial similarity/reproduction as also colourable imitation. The relevant extracts of the said decision are extracted as under:

“6. A perusal of the labels extracted hereinabove



*shows that the comparative features of the two labels are so similar that "NIHAL UTTAM" label can safely be termed as colourful imitation or substantive reproduction. **Colour scheme between the two labels is the same. The manner in which the coconut tree is arranged is the same, the arrangement of two broken coconuts is similar.** Due to the long user in the market, the Appellant's label was quite extensively used and hence the Respondent had access to the Appellant's label. It is the settled position in law that when two labels or artistic works are compared, the broad features are to be compared and not by putting the two labels side by side. The Supreme Court in Parle Products P. Ltd. v. J. P. & Co., Mysore (1972) 1 SCC 618 observed as under:*

*"9. It is therefore clear that **in order to come to the conclusion whether one mark is deceptively similar to another, the broad and essential features of the two are to be considered.** They should not be placed side by side to find out if there are any differences in the design and if so, whether they are of such character as to prevent one design from being mistaken for the other. It would be enough if the impugned mark bears such an overall similarity to the registered mark as would be likely to mislead a person usually dealing with one, to accept the other if offered to him. In this case we find that the packets are practically of the same size, the colour scheme of the two wrappers is almost the same; the design on both though not identical bears such a close resemblance that one can easily be mistaken for the other. The essential features of both are that there is a girl with one arm raised and carrying something in the other with a cow or cows near her and hens or chickens in the*



foreground. In the background there is a farm house with a fence. The word "Glucose Biscuits" in one and "Glucose Biscuits" on the other occupy a prominent place at the top with a good deal of similarity between the two writings. Anyone in our opinion who has a look at one of the packets to-day may easily mistake the other if shown on another day as being the same article which he had seen before. If one was not careful enough to note the peculiar features of the wrapper on the plaintiffs' goods, he might easily mistake the defendants' wrapper for the plaintiffs' if shown to him some time after he had seen the plaintiffs'. After all, an ordinary purchaser is not gifted with the powers of observation of a Sherlock Holmes. We have therefore no doubt that the defendants' wrapper is deceptively similar to the plaintiffs' which was registered. We do not think it necessary, to refer to the decisions referred to at the Bar as in our view each case will have to be judged on its own features and it would be of no use to note on how many points there was similarity and in how many others there was absence of it."

Though the above observation has been rendered in the context of comparison of label marks in a passing off action, the tests for comparison of labels which are artistic works, would be the same.

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13. A perusal of the Trademark Registrar's website shows that the Respondent has attempted registration of various trademarks bearing Nos. 1105118 for NIHAL UTTAM, 1452054 for NIHAL ACTIVE WASHING POWDER, 1452057 FOR NIHAL ACTIVE (LABEL), 1584396 for NIHAL ACTVIE FRESH,



DEVICE OF WASHING MACHINE & BUBBLES (LABEL) and 1584398 for NIHAL GOLD, JK (MONO), DEVICE OF COCONUT, COCONUT TREE & DROPS (LABEL). All of the above trademarks have been refused, withdrawn or opposed. Thus, the Respondent appears to be making a special attempt to imitate the Appellant and copy various marks and labels of the Appellant. The conduct of the Respondent is clearly dishonest and thus, the dictum of Justice Kekewich in Munday v Carey (1905) R.P.C 273 at 276 clearly applies wherein the Court held as under:

"Where you see dishonesty, then even though the similarity were less than it is here, you ought, I think, to pay great attention to the items of similarity, and less to the items of dissimilarity"

21. Further, in *The Modern Law of Copyright and Designs, Fourth Edition* by *Laddie, Prescott and Victoria*, while discussing the terms 'originality' and 'substantial part', it has been emphasised that when substantial similarity between two works arises, then the later work cannot be said to be original. Reference is also given to a decision of New Zealand to highlight what constitutes substantial similarity. The relevant extracts from the said commentary is extracted as under:

"In Interlego AG v Tyco Industries Inc, a case on artistic copyright, the Privy Council cited with approval the following remarks of Lord Atkinson in a previous case" on literary copyright:

"it is the product of the labour, skill and capital of one man which must not be appropriated by another, not the elements, the raw material, if one may use the expression, upon which the labour and skill and capital of the first have been expended.



To secure copyright for this product it is necessary that labour, skill and capital should be expended sufficiently to impart to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material.”

The key question is, therefore: has the second man taken a substantial part of what the first man has created? The expression 'work' refers to a human creation; the artefact is merely the object in which the creation is embodied, as may be seen from the fact that the copyright in the work survives accidental destruction of the artefact. As was well put by Prichard J in a New Zealand case:

“It is not enough that there is a causal connection with a drawing in which the plaintiff owns copyright. **There must also be such similarity between the article made by the defendant and a drawing in which the plaintiff has copyright that it be seen that a substantial amount of the skill and effort which was devoted to can making the drawing was appropriated by the defendant.**

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4.37 Whether or not a substantial part has been reproduced must be determined by reference to the copyright work and not the work that is alleged to infringe. The question in any particular case is whether the features found to have been copied from the copyright work formed a substantial part of that work as an artistic work. **That is a question of judgement or impression. However, in answering it, it is not generally relevant to consider whether the features that are alleged to have been copied also comprise a**



substantial part of the alleged infringing work. As a result, even though the alleged infringing work may not look particularly similar to the copyright work, it may amount to an infringement. That said, in certain cases it may still be important still not to lose sight of the differences between the copyright work and the alleged infringement since they may help to decide whether copying has taken place at all.

22. In the present case, apart from the substantial similarity, the Respondent No. 1's work is also a slavish imitation of the Petitioner's work itself and the distinguishing elements, if any, do not affect the substantial similarity and the imitation that the Respondent No. 1 has resorted to. Accordingly, in the above facts and circumstances, bearing in mind the legal position, the Respondent No. 1's registration having been wrongly applied for as an original work deserves to be rectified and expunged from the Register of Copyright in accordance with Section 50 of the Act.

23. The petition is allowed and a direction is issued to the Registrar of Copyrights to rectify the register by expunging the Respondent No. 1's copyright registration bearing no. 128962/2019 for the work 'GOORCHARRE MAST SEVIAN'. Let the said expunging be carried out within 8 weeks.

24. The Registry is directed to communicate a copy of this order to the Registrar of Copyrights on the email id: llc-ipo@gov.in for compliance. Ms. Nidhi Raman, Id. CGSC to also communicate this judgement to the Registrar of Copyrights.

**PRATHIBA M. SINGH
JUDGE**

SEPTEMBER 6, 2023 *Rahul/am*