

**IN THE SPECIAL COMMERCIAL COURT (HARYANA)
PRESIDED OVER BY R.P. GOYAL, ADDITIONAL DISTRICT
JUDGE GURUGRAM.(UID No. HR0091).**

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CNR No. HRGR01—014316-2017
CIS No. CS/138/2017

Case No. 69.
Date of Instt: 06.11.2017/24.10.2016.
Date of decision: 11.04.2018.

Ashoka Distillers & Chemicals Pvt. Ltd. (through its Commercial
Manager) 501, Chiranjiv Tower, 43 Nehru Place, New Delhi.

.....Plaintiff.

Versus

Oasis Commercial Pvt. Ltd. (through its Director) 1-HD-8, Pitam
Pura, New Delhi (also at village Jatwar, Tehsil Naraingarh, Distt.
Ambala (Haryana)-134201.

.....Defendant.

**Suit for Permanent and Mandatory Injunction for Infringement
of Trademark, Copyright, passing off, Delivery up and Damages.**

Present Sh. Mohak Bhadana, counsel for the plaintiff.
Defendant ex-parte vide order dated 15.03.2018.

JUDGMENT

The plaintiff Company has filed the suit for permanent and mandatory injunction for infringement of trade mark, copy right, passing of, delivery up and damages stating that the plaintiff being a private limited company, through Sh. Lalit Mohan Panday, Commercial Manager of the company who is the duly authorized person of the company.

It is stated that the plaintiff company is carrying on an old and established business of manufacturing and selling country made liquor, Indian made foreign liquor since the year 1992 under several

trade marks and one of the well known trade marks of plaintiff which includes 'Mastana' a registered trade mark in class vide registration No. 628720 dated 23.05.1994 under Trade Mark Act 1999. By virtue of the registration of the mark 'Mastana', plaintiff has got exclusive rights under the Trade Marks Act as well as in common law to use the mark 'Mastana' or to prevent its misuse either in identical form or deceptive similar thereto by third parties venturing in the similar business or commercial activities. Mark 'Mastana' has a distinctive colour scheme, getup and layout and has become very popular amongst the trade and public.

The trademark and its distinctive label is one of the most reputed and well known brands of the plaintiff. Annexure P-4 is the copy of the chart depicting annual sales figure of Trade mark 'Mastana' since financial years 1992-93 till 2016-17 (till 31.08.2016) i.e. from INR 87,761/- to 27,21,50,565/-.

In the third week of October 2016, the plaintiff came to know through its dealer namely, Mr. Lala Ram, located at L-14A, Railway Road, Ballabgarh, Faridabad that there is a label 'MAST Hasina' which is virtually identical to the aforesaid trade mark of the plaintiff's trade mark. The plaintiff had obtained injunction against the defendant from using the visually deceptive trade mark in Civil Suit No. 206/2016 from Hon'ble Delhi High Court vide its order dated 04.10.2016 whereby the defendant was restrained from manufacturing,

selling or launching from sale country made liquor, whiskey, gin rum and or any other allied or cognate goods under the mark 'MASTANA'. However the defendant had introduced another deceptively similar brand name 'MAST Hasina' the Hindi meaning of defendants mark 'MAST Hasina is almost identical to Mastana being used by the plaintiff and conveys the same idea as that of the trade mark Mastana. It is not only the visual similarity but also the phonetic similarity which leads to infringement of trademark 'Mastana'. Overall features description and placements of devices of the two labels are identical. Similar background of the plaintiff's label is brown in colour. The trade mark 'Mastana' of plaintiff and 'Mast Hasina' of defendant are nearly identical. It is submitted that public buys the products on the basis of first impression and therefore the use of trade mark 'Mast Hasina' by defendant conveys the identical idea as that of plaintiff. Defendant is trying to free ride the hard earned goodwill and reputation of the plaintiff because trademark 'Mastani' is close to that of plaintiff trademark 'Mast Hasina' and can be sold as substitutes to each other. By doing wrongful acts, defendant is diverting the plaintiff's business and is earning profits to which it is not entitled. The plaintiff never authorized the defendant to use the similar mark and label in relation to their goods. The defendant is carrying out its legal activities without conference and/ permission of the plaintiff.

The trademark of the defendant is nearly identical to the

trademark of the plaintiff.

- A. A Trade mark of the defendant is nearly identical to the trade mark of the plaintiff.
- B. Both the labels are identical in their colour scheme.
- C. The graphics in both the labels are far beyond being distinctive to each other.
- E. The purchasing public is the same.
- F. The trade channel is the same.

The illegal trade activities of the defendant is causing irreparable loss, injury and damage to the plaintiff in their business, goodwill and reputation. The profits earned by the defendant by appropriating the plaintiff's goodwill under the said well known trademark and trade dress which lawfully belongs to the plaintiff and they are liable to be restored to the plaintiff and the defendant is liable to render truthful accounts of profits.

The cause of action arose on 15th October, 2016 when the plaintiff came to know about the sale of country made liquor named 'Mast Hasina' and when the defendant was restrained from using the trademark **MASTANA** by the Hon'ble Delhi High Court and it is continuing one.

The court has got territorial jurisdiction to entertain and try the present suit against the defendant.

The suit has been valued for the purpose of court fee and

jurisdiction as detailed in para No. 25 of this plaint. Therefore it is prayed that a decree for permanent injunction restraining the defendant, its directors, partners, proprietors, agents, as the case may be its servants, officers and representatives or any one acting on its behalf directly or indirectly from manufacturing, marketing and selling or launching and offering for sale country made liquor, whiskey gin rum and or any other allied and cognate goods under the mark 'Mast Hasina' which is deceptively similar to the registered trademark 'Mastana' of the plaintiff or any other mark creating confusion deception causing infringement of plaintiff's registered trademark 'Mastana.

2. For delivery up by the defendant to the plaintiff all offending material, labels, goods, cartons dies, wrapping and other material bearing the offending trademark/label get up, colour scheme for purposes of destruction and/or obliteration as the case may be.

3. Damages to the tune of Rs. Two crores in favour of plaintiff and against the defendant in view of the injury and harm caused to the plaintiff in the course of the trade and all other acts of damage along with costs of the suit.

4. The plaint of the plaintiff is accompanied by the duly sworn attested affidavit of Lalit Mohan Pandey S/o Sh. H.D. Pandey aged about 56 years C/o 501, Chiranjiv Towers, 43, Nehru Place, New Delhi-110019, presently at Faridabad.

5. On notice the defendant appeared, filed the written statement taking preliminary objections regarding territorial jurisdiction ; suit not properly verified and instituted by duly authorized person ; the suit is liable to be dismissed due to non-joinder and mis-joinder of the necessary party ; the suit is liable to be dismissed as the trade dress or the label of the rival products of the plaintiffs and the defendants are entire different label and has no similarity at all.

On Merits:

All the paras of the plaint have been denied and controverted except those which are matter of record. It is denied that trademark 'Mastana' was conceived, coined and adopted by plaintiff in the year 1992 for country liquor. The word 'Mastana' is a Hindi word and can be used by all the sundry. It has also been denied that label in respect of the products bearing the mark 'Mastana' has a distinctive colour scheme, get up and layout. In fact a clear look of the two labels goes to show that the label of the plaintiff has a goblet/jam, small surahi and big suarhi and device of defendant is a bottle and a jam without carving and without any big goblet. The word grain based on left side corner of the label with the device of grain is a mandatory provision required under the Excise Law. There is no originality in the art work of the plaintiff since the two labels of the plaintiff and the

defendant are poles apart. Label of both the parties are different in colour, words, font, size, print and design etc. and there is no similarity in the description on the labels. Defendant has not adopted identical mark to that of plaintiff's mark or label to earn illegal profits. Defendant and its sister concerns under the Oasis Group of Companies have been in trade of liquor manufacturing since the year 1987 and have amassed tremendous sales and reputation for their brands. It has been denied that plaintiff during the due course of its business gets the annual approval from the Excise and Taxation Commissioner, Haryana in relation to the continuous use of its trademark 'Mastana' and trademark 'Mastana' has acquired highest level of distinctiveness in the trade. Defendant neither ever tried to sell its products as substitutes to each other nor has tried to free ride the goodwill and reputation of plaintiff. Defendant is doing its business in a legal way. It has been denied that defendant is creating an impression in the mind of the prospective purchaser public that the defendant's business has originated from the house of plaintiff.

It is prayed that suit of the plaintiff may be dismissed with costs.

6. From the pleadings of the parties the following issues were framed by the Court:-

- 1) Whether the suit has been instituted by a duly authorized person? OPP

- 2) Whether defendant has infringed the trademark of plaintiff, if so, to what effect? OPP
- 3) Whether plaintiff has no cause of action to file the present suit? OPD
- 4) Whether the suit is not maintainable in the present form? OPD
- 5) Whether the suit of the plaintiff is bad for non-joinder and mis-joinder of necessary parties? OPD
- 6) Relief

7. The plaintiff in his evidence examined Lalit Mohan Pandey as PW1 who has tendered his affidavit Ex. PW1/A along with documents Ex. P1 to Ex. P-9 and mark A to mark C (Colly) and Arshad Khan as PW2 who has tendered his affidavit as Ex.PW2/A along with documents Mark C and Mark D and closed the evidence.

8. The defendant examined Vijay Narang as DW-1 who has tendered his affidavit as Ex.DW1/A along with documents Ex.DW1/1 to Ex.DW1/8.

Ex.DW1/1 is copy of board Resolution passed by the defendant company in favour of Mr. Vijay Narang.

Ex. DW1/2 a copy of Excise License issued to the defendant Company for the label 'Mastani Hasina'.

Ex. DW1/3 Colour copy of defendant's label. Ex. DW1/4 Copy of Dictionary- the Penguin English Hindi/Hindi-English Thesaurus and Dictionary 2007 edition part 3.

Ex. DW1/5 Copy of search report for the trademark Mast Masti and Mastana as downloaded from the website of the trademarks Registry. Ex. DW1/6 A copy of CD of the song 'Tu Cheez Badi Hai Mast Mast'. Ex. DW1/7 Original invoices of the defendant, Ex. DW1/8 Copy of status report of the trademark 'Mast Hasina' under No. 3374574 in class 33 as downloaded from the website of LD. Registrar of Trademarks.

9. I have heard the learned counsel for the plaintiff, perused written submissions and returned my findings as under.

10. The burden to prove issue No. 3 to 5 was upon the defendant but as the defendant was proceeded ex-parte therefore this court has to decide only two issues that is issue no. 1 and 2.

11. Now the question arises as to whether the suit has been instituted by duly authorized person. Let us see the evidence of PW-1 in this connection. The plaintiff in his affidavit PW-1/A has recorded in para no. 1 of the affidavit as under:-

I Lalit Mohan Pandey, S/o Sh. H.D. Pandey aged about 60 years C/o 501, Chiranjiv Towers, 43 Nehru Place, New Delhi-110019, presently at Faridabad, do hereby solemnly affirm, declare and depose as under:

That the plaintiff is a private limited company incorporated under the Companies Act, 1956 having its registered office at Gehlab Road, Village and Tehsil Hathin, District Palwal,

Haryana and its Head Office at the aforesaid given address. I am working with the plaintiff Company. At the time of institution of suit my designation was Commercial Manager and at present also I hold the same position in the plaintiff company. I have complete knowledge about the facts and circumstance of the instant case. I am authorized by the plaintiff company to institute and prosecute the instant suit for and on behalf of the plaintiff including to sign and verify the pleadings applications, affidavits and documents and do all the actions in connection with any litigation on behalf of the plaintiff. True certified copy of the Incorporation Certificate of the plaintiff company dated 03.12.1985 is Ex. P-1 (enclosed herewith). The Board of Directors Resolution dated 31.03.2002 is Ex. P-2.

12. It is revealed from his cross examination that he working in the plaintiff company since 1998 as a Commercial Manager they had approved label from trademark Registrar Delhi. In the end of the cross examination of the witness it has been suggested to the witness that was in correct to suggest that he was deposing falsely being employee of the plaintiff company.

13. In SA Vs. AA it has been held by Hon'ble Delhi High Court on 22.03.2016 in its judgment that when no specific questions have been asked to a witness about the facts stated in examination chief it means that the version put forward by the witness in examination chief is correct therefore it can be safely said that the suit

has been filed through a duly authorized person.

14. Let us come to the another aspect of the matter in issue as to whether the defendant has infringed the trademark of the plaintiff and is liable to render true accounts of the income earned by virtue of use of goodwill and name of the plaintiff by using the trademark of the plaintiff in a deceptive manner.

Trade Marks Act, 1999

Sec.2 (m) 'mark' includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof.

Sec.2 (zb) 'trade mark' means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods their packaging and combination of colours.

Sec. 2(h) 'deceptively similar' A mark shall be deemed to be deceptively similar to another mark if it so nearly resembles that other mark as to be likely to deceive or cause confusion.

15. The plaintiff when stepped into the witness box he reiterated all the facts as set up in the plaint and his cross examination by the defendant failed to impeach his credit and the defendant also examined Vijay Narang as his own witness and he was cross examined but he failed to give satisfactory answers in his cross examination. The

documentary evidence led by the plaintiff makes out a robust case in his favour and against the defendant whose activity of selling infringing product has caused immense financial loss to the plaintiff in as much as the defendant has been freely riding on the reputation and goodwill of the plaintiff.

16. The following comparative description of the contesting labels/trade marks shall assist this Hon'ble Court to arrive at a just conclusion:-

- a) Overall features description and placements of devices of the two labels are identical.
- b) Similar background of the plaintiffs label is brown in colour.
- c) The trade marks Mastana of the plaintiff and Mast Hasina are nearly identical with the word Shaam depicted in almost unreadable font relatively.
- d) Similarity in depiction of containers in which liquor is either stored/served or consumed.
- e) The symbol of Grain based is identical in both the labels.
- f) In between its label the plaintiff has placed goblet/jar and surahi in yellow colour and similarly, the defendant has placed similar marks in between its label which is capable of deceiving the prospective consumer since its shape is identical with that of the goblet used by the plaintiff.
- g) The plaintiffs label contains the slogan under the yellow coloured goblet- 'Special Masaledar Desi Sharab' written in black font and that of the defendant's contain Masaledar Desi Sharab written also in white font.
- h) Similarity of placement of devices and features.
- i) Description on the label is similar.

17. Reliance can be placed upon **Parle Products (P) Limited**

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-:13:-

Vs. J.P. & Company Mysore (1972) 1 Supreme Court Cases page 618, Cadila Health Care Ltd vs. Cadila Pharmaceuticals Ltd. (2001) 5 Supreme Court Cases page 73, Khoday Distilleries Ltd. Vs. The Scotch Whisky Association (2008) 10 Supreme Court Cases page 723, Mohan Meakin Ltd Vs. A.B. Sugars ltd 204 (2013) DLT 177, Mahasian Di Hatti Ltd. Vs. Raj Niwas 181 (2011) DLT 55.

18. So in view of the voluminous evidence both oral as well as documentary and also in view of the case law relied upon by the plaintiff, it can be safely said that the plaintiff is entitled to a decree for permanent injunction restraining the defendant its directors, partners or proprietors as the case may be its servants officers agents and representatives or any one acting on its behalf directly or indirectly from manufacturing marketing and selling or launching and offering for sale the country made liquor, whiskey, gin, rum and/or any other allied and cognate goods under the mark “Mast Hasina” which is deceptively similar to the registered trademark “Mastana” of the plaintiff or any other trademark/label creating confusion and deception causing infringement of plaintiff's registered trademark “Mastana” and it is also ordered that the defendant would deliver to the plaintiff all offending material, labels, goods, cartons, dies, wrapping and other material bearing the offending trademark/label, getup, colour scheme

for the purposes of destruction and/or obliterating as the case may be.
It is ordered accordingly.

19. In his written submission the learned counsel for the plaintiff though demanded a damages to the tune of Rs. Two crores in view of the injury and harm caused to the plaintiff in the course of his trade and all other acts of damage but he has not referred to any evidence in his written submissions from which the court may conclude about the quantum of damages suffered by the plaintiff nor he has sought production of volume of sales of defendant. Therefore the relief of the damages is declined.

20. The suit of the plaintiff for permanent injunction and delivery up in the aforesaid terms stands decreed with costs.

Decree sheet be prepared accordingly. File be consigned to record room after due compliance.

Announced in open Court

(R.P. Goyal)

Dt: 11.04.2018.

Additional District Judge-cum-
Judge, Special Commercial Court,
Gurugram. (UID No. HR0091).

Ashoka Distillers and Chemicals Pvt. Ltd. vs. Oasis Commercial Pvt. Ltd.

-:15:-

Present Sh. Mohak Bhadana, counsel for the plaintiff.
Defendant ex-parte vide order dated 15.03.2018.

Vide separate judgment of even date, the suit of the plaintiff has been decreed with costs.

Decree sheet be prepared accordingly. File be consigned to record room after due compliance.

Announced in open Court

(R.P. Goyal)

Dt: 11.04.2018.

Additional District Judge-cum-
Judge, Special Commercial Court,
Gurugram. (UID No. HR0091).

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