

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

% Decided on: 17<sup>th</sup> October, 2019

+ **CS(COMM) 129/2019**

DHARAMPAL SATYAPAL SONS  
PRIVATE LIMITED

..... Plaintiff

Represented by: Ms.Vaishali Mittal, Ms.Mrinali  
Menon and Mr.Siddhant Chamola,  
Advocates.

versus

MR. AKSHAY SINGHAL & ORS.

..... Defendants

Represented by: Mr.Pankaj Kumar, Advocate with  
defendant No.1 in person.

**CORAM:**

**HON'BLE MS. JUSTICE MUKTA GUPTA**

**MUKTA GUPTA, J. (ORAL)**

1. By the present suit, plaintiff inter alia prays for a decree of permanent injunction restraining the defendants, its partners, proprietors, officers, agents, servants, affiliates, distributors etc. from manufacturing, selling, offering for sale, advertising, directly or indirectly dealing in any manner with the confectionary products and/or goods or services or food candies or hard flavoured candies or fruit candies using the trademark 'PLUSS' or any other trademark deceptively similar to the plaintiff's trademark and unique trade dress in relation to the candies and/or passing off defendants' product as that of plaintiff's product, infringing the copyright vested in the original artistic works in the plaintiff's label, packaging overall get up etc. and/or leading to dilution of plaintiff's 'PULSE' trademark overall colour scheme and uniqueness or declaring the plaintiffs' trademarks 'PULSE' as a "well known" trademark within the meaning of Section 2 (1) (zg) read with

Section 11 (6) of the Trademarks Act, 1999, delivery of impugned articles, rendition of accounts, damages and costs.

2. Case of the plaintiff is that it is a private limited company having annual turnover of more than ₹6500 crores with strong presence in high growth sector such as F&B, hospitality, mouth fresheners, Pan Masala, Tobacco, Agro Forestry, Rubber Thread and Infrastructure. Plaintiff has introduced a number of products such as RAJNIGANDHA, CATCH, PASS-PASS, CHINGLES, PULSE etc. Plaintiff's candies under the trademark 'PULSE' were launched on 13<sup>th</sup> December, 2014 and have enjoyed tremendous popularity amongst all classes of public ranging from the working class to school going children to the elderly. Plaintiff claims that the popularity of the plaintiff's 'PULSE' candies can be gauged from the sales figures of the plaintiff's candies under the trademark and trade-dress raking ₹556.04 crores worth business.

3. Plaintiff's goods under the trademark 'PULSE' and trade-dress for its product 'PULSE', the Kaccha Aam flavoured candy written as '*Kaccha Aam with Tangy Twist*' marked the plaintiff's foray into the candy segment. 'PULSE' was conceptualized and introduced in the year 2013 under the umbrella brand of the plaintiff's PASS-PASS for the confectionery business. Plaintiff designed the exclusive trade-dress to adopt and ensure a distinctive getup and layout for its 'PULSE' candies resulting in the consumers choosing the same at the first site.

4. Plaintiff's 'PULSE' products with its trade-dress are inherently distinctive and have amassed immense goodwill and reputation amongst all classes of consumers and people have now associated 'tangy twist' flavor to the well-known 'PULSE' candies. The core concept behind the 'PULSE'

candies is the unique and exclusive method of ingredient composition-A hard boiled flavor candy filled with tangy and tingly salt and spices in its central powered filling. A consumer upon consuming the PULSE kaccha aam flavoured candy experiences a fruity taste subsequently peaking with a tangy surprise.

5. Plaintiff is selling the said 'PULSE' candies with the tagline '*Pran Jaaye par Pulse Na jaaye*'. Plaintiff claims that pursuant to the goodwill and reputation accrued to 'PULSE' candies with the kaccha aam flavor, the plaintiff adopted four other flavours namely-PULSE Guava flavor, with the tagline "*Guava with tangy twist*" in February, 2016, PULSE Orange flavor with the tagline "*Orange with tangy twist*" in 2016, PULSE pineapple with the tagline "*Pineapple with tangy twist*" and PULSE litchi with the tagline "*Litchi with the twist*" in and around August, 2017. With the growing demand of the candies and tangy flavours plaintiff has also introduced the same in now a sweetened drink with the packaging and the 'PULSE' candies flavours are also now available in PULSE Zero variant with no salt and sugar.

6. After the plaintiff's candies with trademark 'PULSE' were launched in December, 2014 plaintiff claims to have spent substantial amount on promoting the same through different medias both print and electronic which enjoy a wide viewership, circulation and readership all over India. The expenditure of advertising of the plaintiff's product PULSE was sum of ₹15,617 in the year 2014-2015 and reached ₹25,94,18,061/- in the year 2017-2018 upto May, 2018. Plaintiff has been awarded with the India Star award for its unique packaging design, enhanced user experience and innovation in product handling for the 'Pulse Mango Candy' and thus the

plaintiff claims extensive reputation and goodwill that has continuously vested with the brand of the plaintiff's product. Plaintiff has also launched a TV reality show under the mark 'PULSE'" and an advertisement under the tagline "*Pran Jaaye, par PULSE na Jaaye*".

7. The essential features of the PULSE Kaccha Aam product packaging of the plaintiff are as under:

1. *Parrot Green metallic green and black colours used at the base.*
2. *A slant divide to depict equal halves (two right angles) or both the colours.*
3. *PULSE written in an artistic way in alternating light green and light orange colours, in the foreground to depict pulsation going up and down.*
4. *Pulse graph show in the background in white.*
5. *A device of half cut mango shown at the right hand side bottom of the packaging.*
6. *Kachcha Aam with Tangy Twist written at the bottom of the product in a stylized way in parrot green metallic colour.*

8. Plaintiff's trademark has been granted trademark registration for its trademark 'PULSE' as well as the overall get up, layout and colour combination comprising of its packaging. Besides India the plaintiff's trademark 'PULSE' is registered in other countries, that is, Afganistan, Bhutan, Kuwait, Myanmar, Zanzibar and United Kingdom and is enjoying the trans-border reputation being sold in various countries.

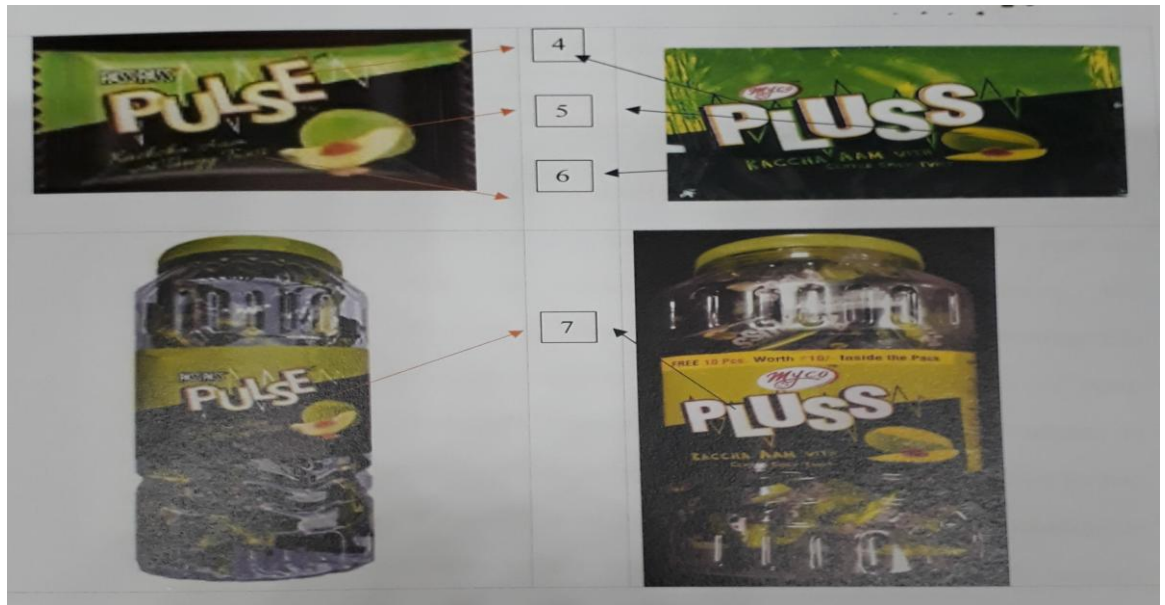
9. Grievance of the plaintiff against the defendants is that the defendant No.1 and 2, verily believed to be partners of the firm M/s Swastik Industries, defendant No.3 herein are engaged in the business of manufacturing and supply of candy products like flavoured candy, cola fizzy candy, funda fizzy candy, cool fizzy candy etc. under the brand name "MYCO". During the

course of market surveillance in the last week of January, 2019 the plaintiff learnt of the defendants business of advertising and selling candies having the flavor of raw mango and bearing the mark PLUS and trade-dress under the “MYCO” trading style. Defendants have been selling their product under the following packaging:



10. It was informed that the defendants sell their products in Delhi, U.P., Bihar and have a turnover of approximately INR 1.5 crores per annum. Defendants’ products which are sold in and around markets in Delhi are advertised on third party websites such as [www.indiamart.com](http://www.indiamart.com). The comparative packaging of the plaintiff and defendants products are as under:

MANNER OF USE BY THE PLAINTIFF	#	MANNER OF USE BY THE DEFENDANTS
	<div style="border: 1px solid black; padding: 2px; display: inline-block;">1</div> <div style="border: 1px solid black; padding: 2px; display: inline-block;">2</div> <div style="border: 1px solid black; padding: 2px; display: inline-block;">3</div>	



11. The elements of similarity between the packaging of the two products are:

S.NO.	ELEMENTS OF SIMILARITY
1.	The similar/nearly identical manner of writing and placing of PULSE vis-à-vis Defendants' adoption of PLUSS in different shades of color outlining.
2.	The similar/nearly/identical manner of writing "PULSE" in the centre of the package near the slant divide in white capital font across the package;
3.	The similar/nearly identical slant divide between the package dividing the package into two halves between the package;
4.	The similar/nearly identical electric wave in the background of the Plaintiff's PULSE candy has been adopted by the Defendants' in their PLUSS candy.
5.	The similar/nearly identical manner and location of the mango fruit partially sliced similar to the half cut fruit mango on the Plaintiff's PULSE packaging;
6.	The similar/nearly identical manner of positioning the slogan "Kaccha Aam with centre filled twist" adjacent to the mango.

7.	The similar/nearly identical entire get-up, layout and packaging of the product from the exterior side.
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12. It is thus claimed that the act of the defendants amounts to infringement of the plaintiff's trademark, passing off the defendants' goods as that of the plaintiff infringing copyright in the design, intrinsic line of work of the plaintiff's packaging and thereby violating their proprietary rights.

13. In support of the claims made herein above the plaintiff has placed on record documents along with certificate under Sections 65A and 65B of the Indian Evidence Act. When the suit came up before this Court, this Court was pleased to appoint a local commissioner to prepare the inventories of the impugned products infringing the product of the plaintiff as specified in the plaint and take into custody all infringing goods to the defendants on superdari.

14. In view of the material placed on record, and report of the learned Local Commissioner, the plaintiff has made out a case for grant of injunction in terms of prayers (i), (ii), (iii) and (iv) of para-78.

15. Plaintiff also seeks a declaration of its mark 'PULSE' as a well known trade mark. Section 2(zg) of the Trademarks Act which defines a well-known trademark and Section 11(6) which provides the requirement for declaring a trademark as a well known trademark read as under:

*"2(zg) "well-known trade mark", in relation to any goods or services, means a mark which has become so to the substantial segment of the public which uses such goods or receives such services that the use of such mark in relation to other goods or services would be likely to be taken as indicating a connection in the course of trade or rendering of services between those*

*goods or services and a person using the mark in relation to the first-mentioned goods or services.*

.....

*11(6) The Registrar shall, while determining whether a trade mark is a well-known trade mark, take into account any fact which he considers relevant for determining a trade mark as a well-known trade mark including—*

- (i) the knowledge or recognition of that trade mark in the relevant section of the public including knowledge in India obtained as a result of promotion of the trade mark;*
- (ii) the duration, extent and geographical area of any use of that trade mark;*
- (iii) the duration, extent and geographical area of any promotion of the trade mark, including advertising or publicity and presentation, at fairs or exhibition of the goods or services to which the trade mark applies;*
- (iv) the duration and geographical area of any registration of or any application for registration of that trade mark under this Act to the extent they reflect the use or recognition of the trade mark;*
- (v) the record of successful enforcement of the rights in that trade mark; in particular, the extent to which the trade mark has been recognised as a well-known trade mark by any court or Registrar under that record.”*

16. In the decision reported as (2009) 41 PTC 284 (Del) Rolex Sa Vs. Alex Jewellery Pvt. Ltd. & Ors. this Court dealing with a well-known trademark held:

*“15. Section 2(4)(c) defines a well known trademark as the one which in relation to any goods, means a mark which has*

*become so to the substantial segment of the public which uses such goods that the use of such mark in relation to other goods would be likely to be taken as indicating a connection in the course of trade between those goods and a person using the mark in relation to the first mentioned goods. In my view the segment of the public which uses the watches of the category/price range as the watches of the plaintiff, ROLEX is a well known trademark. The said segment of the public if comes across jewellery/artificial jewellery also bearing the trademark ROLEX is likely to believe that the said jewellery has a connection to the plaintiff.*

16. *Yet another provision in the Act, though for the guidance of the Registrar but in relation to well known trademarks is to be found in Section 11(6) of the Act. Upon testing the trademark of the plaintiff on the touchstone of the ingredients of the said provision also, I find the said trademark of the plaintiff to be satisfying the test of a well known trademark. The documents filed by the plaintiff i.e., the advertising done in the media in India since 1947 and particularly in years immediately preceding the suit, registrations obtained show that relevant section of the public in India had knowledge of the trademark ROLEX in relation to the watches. The pleadings of the plaintiff and which are not contested also show that the plaintiff for the last nearly one century has been using the said trademark spread over nearly the entire developed/developing world. The advertisements of the plaintiff had appeared in the magazines in this country even when there were import restrictions. The plaintiff has filed documents to show registration of the trademark in a large number of countries and also to show successful enforcement of its rights with respect to the said trademark.*

20. *Over the years and very quickly in recent times, the international boundaries are disappearing. With the advent of the internet in the last over ten years it cannot now be said that a trademark which is very well known elsewhere would not be well known here. The test of a well known trademark in Section*

*2 is qua the segment of the public which uses such goods. In my view any one in India, into buying expensive watches, knows of ROLEX watches and ROLEX has a reputation in India. Not only so, to satisfy the needs/demands of consumers in different countries, the well known international brands which were earlier available at prices equivalent to prices in country of origin and which owing to the exchange rate conversion were very high, have adapted to the Indian situation and lowered prices. A large number have set up manufacturing facilities here and taken out several variants. Thus, merely because today the price of a ROLEX watch may be much higher than the price of items of jewellery of the defendants as argued, cannot come in the way of the consumer still believing that the jewellery is from the house of the plaintiff. Also, there can be no ceiling to the price at which the defendants will continue to sell their jewellery. The defendants have claimed to be selling rolled gold jewellery; with the price of gold soaring, there is no certainty that the pieces of artificial jewellery of the defendants would not also be in the same range as the watches of the plaintiff. Even otherwise, the trend in modern times has been towards artificial/semi precious jewellery. In fact, the attraction to gold is confined to this part of the world only. In India also today there are several brands of artificial jewellery/semi precious jewellery whose brand value and/or prices are quite comparable to the gold jewellery of the conventional gold smiths*

*24. The goods of the plaintiff may lose their sheen to the strata of the society for which they are intended if such strata finds the goods in the same brand name even though not from the house of the plaintiff being available for a much lower price. The goods of the plaintiff would then cease to be a status symbol or a fashion statement. Undoubtedly, the same would be to the detriment of the plaintiff. Having found a prima facie case in favour of the plaintiff and irreparable injury to be caused to the plaintiff by allowing the defendant to continue using the trademark, I also find the element of balance of convenience to be satisfied in the present case. The registration*

*of the mark of the plaintiff is over 90 years prior to the claimed commencement of the use by the defendant. Even if the defendant, at the time of commencing the use, did not know of the inherent risk in adopting the well known trade mark, the defendant, at least, immediately on applying for registration and on opposition being filed by the plaintiff became aware of the perils in such use. Thus, use by the defendant of the mark is for short time only and use during the period of opposition is of no avail. The mark has got no relation to the jewellery being marketed by the defendants. Unless the defendant is deriving any advantage of the goodwill/brand value of the plaintiff and which it is not entitled to, it ought not to make any difference in the business of the defendants if the said jewellery is sold under a mark other than ROLEX.”*

17. Dealing with the issue of well-known trademark, this Court in the decision reported as 2011 (46) PTC 244 (Del) Tata Sons Ltd. Vs. Manoj Dodia & Ors. held:

*“5. A well known trademark is a mark which is widely known to the relevant general public and enjoys a comparatively high reputation amongst them. On account of advancement of technology, fast access to information, manifold increase in international business, international travel and advertising/publicity on internet, television, magazines and periodicals, which now are widely available throughout the world, of goods and services during fairs/exhibitions, , more and more persons are coming to know of the trademarks, which are well known in other countries and which on account of the quality of the products being sold under those names and extensive promotional and marketing efforts have come to enjoy trans-border reputation. It is, therefore, being increasingly felt that such trademark needs to be protected not only in the countries in which they are registered but also in the countries where they are otherwise widely known in the relevant circles so that the owners of well known trademarks are encouraged to expand their business activities under those marks to other jurisdictions as well. The relevant general public in the case of*

*a well known trademark would mean consumers, manufacturing and business circles and persons involved in the sale of the goods or service carrying such a trademark.*

6. *The doctrine of dilution, which has recently gained momentous ,particularly in respect of well known trademarks emphasises that use of a well known mark even in respect of goods or services, which are not similar to those provided by the trademark owner, though it may not cause confusion amongst the consumer as to the source of goods or services, may cause damage to the reputation which the well known trademark enjoys by reducing or diluting the trademark's power to indicate the source of goods or services.*

7. *Another reason for growing acceptance of trans-border reputation is that a person using a well known trademark even in respect of goods or services which are not similar tries to take unfair advantage of the trans-border reputation which that brand enjoys in the market and thereby tries to exploit and capitalize on the attraction and reputation which it enjoys amongst the consumers. When a person uses another person's well known trademark, he tries to take advantage of the goodwill that well known trademark enjoys and such an act constitutes an unfair competition.*

8. *The concept of confusion in the mind of consumer is critical in actions for trademark infringement and passing off, as well as in determining the registrability of the trademark but, not all use of identical/similar mark result in consumer confusion and, therefore, the traditionally principles of likelihood of confusion has been found to be inadequate to protect famous and well known marks. The world is steadily moving towards stronger recognition and protection of well known marks. By doing away with the requirement of showing likelihood of confusion to the consumer, by implementing anti-dilution laws and recognizing trans-border or spill over reputation wherever the use of a mark likely to be detrimental to the distinctive character or reputation of an earlier well known*

*mark. Dilution of a well known trademark occurs when a well known trademark loses its ability to be uniquely and distinctively identify and distinguish as one source and consequent change in perception which reduces the market value or selling power of the product bearing the well known mark. Dilution may also occur when the well known trademark is used in respect of goods or services of inferior quality. If a brand which is well known for the quality of the products sold or services rendered under that name or a mark similar to that mark is used in respect of the products which are not of the quality which the consumer expects in respect of the products sold and/or services provided using that mark, that may evoke uncharitable thoughts in the mind of the consumer about the trademark owner's product and he can no more be confident that the product being sold or the service being rendered under that well known brand will prove to be of expected standard or quality.*

9. *Article 6bis of Paris Convention, 1967 enjoined upon the Countries of the Union, subject to their legislation so permitting or at the request of the interested parties, to refuse or to cancel the registration and to prohibit the use of trademark which constitutes a representation and imitation or translation liable to create confusion of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of Convention and used for identical or similar goods. This provision was also to apply when the essential part of the mark constituted a reproduction of any such well known mark or an imitation liable to create confusion therewith. The prohibition against use of a well known trademark, under Paris Convention, was, thus, to apply only when the impugned use was in respect of identical or similar goods. Vide Article 16 of TRIPS Agreement 1994, it was decided that Article 6bis of Paris Convention, 1967 shall apply mutatis mutandis to services as well as to goods or services, which are not similar to those in respect of which a trademark is registered, provided that the use of that trademark in relation to those goods or services*

would indicate a connection between those goods or services and the owner of the registered trademark and the interests of the owner of the registered trademark and are likely to be damaged by the impugned use. It was further decided that in determining whether the trademark is well known, the members shall take account of the knowledge of the trademark in relevant sectors of the public, including knowledge in the member concerned which has been obtained as a result of the promotion of the trademark. Thus, the TRIPS Agreement, 1994 brought about a material change by prohibiting use which constitutes a representation or imitation and is likely to create confusion even if such use is in relation to altogether different goods or services, so long as the mark alleged to have been infringed by such use is a well known mark. This Article, thus, grants protection against dilution of a trademark, which may be detrimental to the reputation that the business carried under a well known trademark enjoys.

10. Well known marks and trans-border reputation of brands was recognized by Courts in India, even before Trade Marks Act, 1999 came into force. In , the manufacturers of Mercedes Benz sought an injunction against the Defendants who were using the famous "three pointed star in the circle" and the word "Benz". The Court granted injunction against the Defendants who were using these marks for selling apparel. Similarly, in Whirlpool Co. and Anr. v. N.R. Dongre (1996) PTC 415 (Del.) the Plaintiff Whirlpool had not subsequently registered their trademark after the registration of the same in 1977. At the relevant time, the Plaintiff had a worldwide reputation and used to sell their machines in the US embassy in India and also advertised in a number of international magazines having circulation in India. However, the Defendant started using the mark on its washing machines. After an action was brought against them, the Court held that the Plaintiff had an established "transborder reputation" in India and hence the Defendants were enjoined from using the same for their products. In the Kamal trading Co. v. Gillette UK Limited (1998 IPLR 135), injunction was sought against the Defendants who

*were using the mark 7'O Clock on their toothbrushes. This was further reaffirmed by the Bombay High Court, which held that the Plaintiff had acquired an extensive reputation in all over the world including India by using the mark 7'O Clock on razors, shaving creams. The use of an identical mark by the Defendant would lead to the customer being deceived.”*

18. From the material placed on record, it is evident that:
  - a. The plaintiff's trademark has wide acceptability pursuant to the result of promotion of the trademark.
  - b. The popularity of the plaintiff's trademark and trade-dress extends not only in India but in other countries as well.
  - c. The plaintiff's product, trademark and trade-dress which were launched in 2014 have a wide use across India and are continuing to be used.
19. Hence as per the criteria laid down under Section 11 (6) and Section (7) of the Trademarks Act the plaintiff is entitled to a decree of declaration of its trademark 'PULSE' as a well-known trademark.
20. Plaintiff has led no evidence with regard to the damages. As per the affidavit of statement of costs submitted by the plaintiff, the plaintiff has spent a sum of ₹8,53,369/- including the court fees and the fee of the local commissioner.
21. Consequently, a decree is passed in favour of the plaintiff and against the defendants in terms of prayers (i), (ii), (iii) and (iv) of the suit. The plaintiff's trademark 'PULSE' is declared a well-known trademark.
22. Cost of ₹8,53,369/- is awarded in favour of the plaintiff and against the defendants.
23. Decree sheet be drawn accordingly.

24. Suit is disposed of.

**I.A. 6852/2019 (under Order XIII-A Rule 3 and 6 (1) (a) CPC)**

Application is dismissed as infructuous.

**(MUKTA GUPTA)  
JUDGE**

**OCTOBER 17, 2019**

**‘vn’**

HIGH COURT OF DELHI



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