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

Date of Decision: 21st July, 2022

+ **CS(COMM) 403/2022 & I.As. 10543-44/2022**

HELL ENERGY MAGYARORSZAG KFT Plaintiff

Through: Mr. Nihit Nagpal and Mr. Anuj
Jhavar, Advocates. (M:9818202368)

versus

SHRI BRAHM SHAKTI PRINCE BEVERAGES PVT LTD

& ORS. Defendants

Through: Mr. Jayant K. Mehta, Sr. Advocate
with Mr. Kapil Wadhwa, Ms. Surya
Rajappan and Ms. Deepika Pokharia,
Advocates. (M:9891929028)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh(Oral)

1. The Plaintiff is a Hungarian company which is engaged in the business of manufacture and sale of energy drinks. The Plaintiff has filed the present suit seeking protection of its trademark 'HELL' used for energy drinks. The Plaintiff adopted the said mark in 2006 along with a unique logo, trade dress and artistic work. The Plaintiff's marks are 'HELL'/'HELL ENERGY', 'HELL ENERGY DRINK' which are used in various logo forms and variations. The colour scheme used by the plaintiff is red and black as is depicted below:



2. The Plaintiff promotes its business through the domain name/ website www.hellenergy.com, which was registered by the Plaintiff on 11th June, 2006. The mark 'HELL' has been registered by the Plaintiff since 2007 for 'energy drinks and non-alcoholic beverages' vide international registration number 9333068 in several countries in class 32 as set out in the plaint. The said mark, 'HELL' is also registered in India under Trade Mark No.3618893 under Class 32 in the name of the Plaintiff, since 2017 in respect of energy drinks. The Plaintiff's mark is extensively publicized in F-1 races and it enjoys global goodwill and reputation. The extensive sponsoring of various events as set out in the Plaint shows that enormous investment has been carried out by the Plaintiff in promoting its mark.

3. The grievance of the Plaintiff in the present case is that the Defendants were initially using the mark 'HELLxxx' in respect of energy drinks. The Defendant No.1 had also filed a trademark application in the year 2021 for 'HALL ENERGY DRINKS' bearing No.4909717 in respect of energy drinks, soft drinks, and aerated drinks. A suit, being, **CS(COMM) 254/2021** titled **Hell Energy Magyarország Kft. v. Shri Brahm Shakti Prince Beverages Pvt. Ltd.**, was filed by the Plaintiff. In the said suit, the Court had granted an *ex*

parte ad interim order of injunction, vide order dated 1st June, 2021, in the following terms:

“9. The Plaintiff seeks ex-parte ad-interim injunction against the defendant. This Court is satisfied that the Plaintiff has a strong prima facie case; balance of convenience is in favour of the Plaintiff and they will suffer irreparable loss if the ex-parte ad-interim injunction is not granted against the defendant.

10. The defendant, its directors, agents, licensees, franchisees, representatives, employees, affiliates, stockists, distributors or anyone claiming under them are hereby restrained from manufacturing, marketing, selling, storing and advertising the trade mark HELLxxx and HALL Energy drink; from infringing the plaintiff's trade mark HELL and its variations thereof and the plaintiff's copyright in its product packaging/trade dress and/or using any trade mark, copyright, trade dress deceptively similar to the plaintiff's trade mark, copyright, trade dress



and/or passing off their goods as that of the Plaintiff till the next date of hearing.”

4. Two Local Commissioners were also appointed in the said matter, vide the same order dated 1st June, 2021, who seized large amounts of infringing

products from the premises of the Defendants. The parties had, thereafter, settled their disputes under the aegis of the Delhi High Court Mediation and Conciliation Centre and had entered into a settlement agreement dated 21st September, 2021. The said settlement agreement clearly records that the Defendants acknowledged the Plaintiff's rights in the mark 'HELL'/'HELL ENERGY' and other variants. The Defendants also confirmed and undertook that they would not manufacture, sell or advertise products under the impugned mark 'HELLxxx', 'HELL ENERGY DRINK', or any other confusingly or deceptively similar trademark. The relevant terms of the settlement agreement are set out below:

"1. The Second Party hereby acknowledges and recognizes the First Party to be the prior adopter, user, and the rightful owner/proprietor of the trademark



"HELL", and its variations thereof, and the Second Party does not claim any right over the said trademark or any mark, which is confusingly or deceptively similar, in any manner to the trademark of the First Party.

2 The Second Party hereby acknowledges and recognizes the First Party's sole and exclusive copyright and other proprietary rights and interests in the First Party's packaging and trade dress,



which are subject matter of this suit.

3. The Second Party agrees, undertakes and confirms that in future the Second Party shall never:

i. manufacture, market, sell, store and advertise by using the impugned mark "Hellxxx"/ "HALL ENERGY



DRINK/ and/or any other confusingly or deceptively similar trade mark in respect of their beverages, goods and business, by themselves, their directors, partners, proprietors, agents, servants, licensees, sub-licensees, franchisees, subfranchisees representatives, employees, affiliates, stockists, distributors, sub-distributors, dealers, sub-dealers, retailers or anyone claiming under them, directly or indirectly;”

5. On the basis of the said settlement agreement the suit was decreed in favor of the Plaintiff, vide judgment dated 29th September, 2021. Despite this being the position, it is the case of the Plaintiff that the Defendants were found to be in violation of the terms of settlement and they launched another product by the name ‘HILLxxx’ which is depicted below:



6. It is also argued by Id. Counsel for the Plaintiff that the Defendants are habitual infringers of various well-known products. A market survey was conducted by the Plaintiff which revealed that the Defendants had flooded the market with their products under the mark 'HILLxxx'. Photographs of various stores are placed on record showing stacking of the Defendants' products along with the Plaintiff's products.

7. Ld. Counsel for the Plaintiff submits that in the contempt petition being *Contempt Petition No. 290/2022* titled *Hell Energy Magyarország Kft. v. Mr. Yash Tekwani & Ors.*, the stand of the Defendant in reply to the contempt is that the mark 'HILLxxx' is a coined mark and is structurally, phonetically, and visually different from Plaintiff's marks 'HELL' and 'HELL ENERGY'.

8. It was in this background that the Court had considered the suit on 2nd June, 2022. On the said date, this Court passed a second order of injunction against the Defendants, in the following terms:

“18. *Heard, ld. Counsel for the Plaintiff. A perusal of the record as also the physical products which have been handed over to the Court leave no manner of doubt in the mind of the Court that the mark ‘HILLxxx’ used by the Defendants is almost identical to the trademark ‘HELLxxx’ which was earlier being used by the Defendants and was enjoined by this Court. The product ‘HILLxxx’ cannot be stated to be different from the product ‘HELLxxx’ which was in turn found by the Court to be deceptively similar to the mark ‘HELL’ of the Plaintiff. Moreover, the Plaintiff being the proprietor of the trademark ‘HELL’ in India, it enjoys both statutory and common law rights in the said mark. In the opinion of the Court, the new mark adopted by the Defendants is also almost identical to the mark of the Plaintiff. Further, the Defendants are prima facie in violation of a decree passed by this Court.*”

19. *The Plaintiff has, thus, made out a prima facie case for grant of interim injunction. Balance of convenience is in favour of the Plaintiff and against the Defendants. Irreparable harm would be caused if the order of injunction is not granted. Moreover, even to maintain the integrity of the decree already granted against the Defendants, it is necessary to enjoin the Defendants. Accordingly, the Defendants are restrained from manufacturing, selling, offering for sale, distributing, promoting or advertising or in any manner dealing in any beverages or energy drinks or any cognate or allied goods under the mark ‘HILLxxx’ or any other mark which is identical or deceptively similar to the Plaintiff’s mark ‘HELL’ ‘HELL ENERGY’, etc.”*

9. Vide the above order dated 2nd June, 2022, a Local Commissioner was also appointed to visit the premises of the Defendants, and to seize all the infringing products. The Local Commissioner executed the Local Commission on 10th June, 2022 at the Defendants’ premises in Hapur, Uttar

Pradesh. The Local Commissioner had to continue the execution of the commission on 11th June, 2022, due to an alleged power outage in the premises of the Defendants on 10th June, 2022. The Local Commissioner found huge quantities of 250 ml bottles of the Defendants' product, as also a substantial amount of infringing packaging material, labels, and cardboard cartons. Approximately 52,530 bottles of 250 ml and 2,000 bottles of 250 ml containing defective product were found by the Local Commissioner. The total inventory prepared by the Local Commissioner in his report is set out below:

“1 pilot (crate) contains 98 cartons and each carton contains 30 bottles.

So 1 crate has $(98 \times 30) = 2940$ bottles

Total pilot crates seized= 15 & bottles seized $(15 \times 2940) = 44,100$

bottles

281 separate cartons were found (8340 bottles)

Total bottles seized= 52,530 bottles

2 bags of defective bottles, each bag containing approx. 1000 bottles.

Packaging material (card board cartons)= 13200 pieces

11 rolls of Labels bearing 'HILLxxx'”

10. The seized products were then handed over on *superdari* to the Plaintiff. The Local Commissioner sealed a portion of the machinery used for manufacture of the infringing “HILLxxx” energy drinks. The invoices and other sales figures were also collected by the Local Commissioner. The Local Commissioner's report reveals that some effort was also made by the Defendants to hinder the execution of the Local Commission. Finally, the Local Commissioner's proceedings concluded on 11th June, 2020 at 4:10 p.m.

11. Thereafter, *I.A. 10543/2022* has been filed on behalf of the Defendants' seeking permission to de-seal the machinery seized by the Local Commissioner. An application under Order XXXIX Rule 4 was also filed on behalf of the Defendants seeking vacation of the injunction order dated 2nd June, 2022.

12. Submissions on behalf of both parties have been heard on the last date i.e., 12th July, 2022, as also, today. Ld. Counsel for the Plaintiff, Mr. Nihit Nagpal, has vehemently urged the Court that the conduct of the Defendants shows that they have repeatedly committed contempt of Court, beyond any doubt. Ld. Counsel for the Plaintiff makes specific reference to the previous settlement agreement dated 21st September, 2021 to show how the Defendants are blatantly violating the decree which was granted by this Court. It is also submitted that in the proceedings of the contempt petition being *CONT.CAS(C)290/2022*, filed by the Plaintiff, the ld. Single Judge has taken strong note of the contempt on behalf of the Defendants.

13. In the circumstances of the present case, it is urged by the ld. Counsel for the Plaintiff that the present suit is one in which penal damages ought to be awarded in favour of the Plaintiff.

14. On the other hand, Mr. Jayant Mehta, ld. Sr. Counsel and Mr. Kapil Wadhwa, ld. Counsel, for the Defendants have submitted to the Court that the Defendants are not very literate. Mr. Yash Tekwani, who is the Director of Defendant No.1-Company is present in Court today. He submits that his son Mr. Piyush Tekwani is the second Director of the Defendant No.1- Company. He further submits that he was acting on legal advice given by the Counsels who had been previously engaged by him.

15. Further, an alternate packaging has been produced before the Court

with the title “PRINCE HILLxxx”, which the Defendants are agreeable to adopt in future. The said packaging has been extracted hereinbelow:



16. This Court has perused the proposed packaging provided by the Id. Counsels for the Defendants. However, in terms of the settlement agreement dated 21st September, 2021, the Defendants are not entitled to use the mark “HILLxxx” in any manner, as the same is confusingly and deceptively similar to “HELLxxx”, which is the name/mark used by the Plaintiff.

17. Upon this being put to Id. Counsels for the Defendants, it is proposed that the Defendants are willing to change the name of their energy drink to “PRINCE B-FASTxxx”. Id. Counsel for the Defendants also submits that the Defendants have suffered huge losses as more than 50,000 bottles worth of stock has already been seized by the Local Commissioner and the same is lying with the Plaintiff on *superdari*. He submits that the entirety of the said

stock would be completely wasted and would be an enormous financial loss to the Defendants. He further submits that the Defendants had been previously ill-advised by the erstwhile Counsels. Hence, he prays that a compassionate view of the matter be taken by this Court.

18. Heard Id. Counsels for the parties, as also, Mr. Yash Tekwani, Director of the Defendant No. 1-Company, who is present in Court today. There can be no doubt that the Defendants were well aware of the previous orders passed by this Court, by virtue of the signed settlement agreement dated 21st September, 2021. The clauses in the said agreement leave no doubt that the Defendants were not permitted to adopt any mark identical or confusingly or deceptively similar to the Plaintiff's mark 'HELLxxx'. The adoption of the mark 'HILLxxx' and the sale of the products under the said mark by the Defendants is a clear indication that the Defendants show scant regard to the orders passed by this Court.

19. Even the proposed labels, extracted hereinabove, show that the Defendants wish to continue the use of the mark 'HILLxxx'. It is only upon this Court clearly expressing its disapproval of the conduct of the Defendants that the Defendants have expressed remorse and have agreed to remove the word 'HILL' from the label. Under such circumstances, Clause 13 of the settlement agreement dated 21st September 2021, which imposes minimum damages of Rs.20,00,000/- deserves to be given effect to. The said Clause 13 of the settlement agreement dated 21st September, 2021 has been extracted below:

“13. The Parties agrees that they shall abide by the terms and conditions set out in the present Settlement Agreement and shall not dispute the same hereinafter in

future. The Parties further agree that the statements made by them herein in this Settlement Agreement shall be taken as their respective undertakings to the Hon'ble Court and if there is violation of any terms mentioned herein by the Second Party, then the second party shall pay a sum of Rs.20,00,000/- (Rupees Twenty Lakhs Only) to the First Party upon receipt of intimation of breach of agreement and shall also be held liable for contempt of court under the Contempt of Courts Act, 1971.”

20. In the face of the above Clause-13, which fixed a minimum payment of Rs. 20,00,000/- upon the breach of the said agreement, the Court is of the opinion that this is a fit case for the imposition of heavy costs/damages.

21. Accordingly, the present suit is decreed in terms of the reliefs as sought in paragraph 76(a), (b) and (c) of the Plaint. The Defendants shall pay a sum of Rs.30,00,000/- to the Plaintiff, towards costs and damages for having violated the orders passed by this Court.

22. The said payment shall be made in three equal instalments, on or before 30th November, 2022. The first payment be made by 15th September, 2022 of Rs.10,00,000/-, the second instalment by Rs.10,00,000/- by 15th October, 2022 and finally, Rs. 10,00,000/- shall be paid by 30th November, 2022.

23. The payment in the manner as set out above shall be made to the bank account of the Id. Counsel for the Plaintiff. The details of the bank account of the Plaintiff shall be furnished by Id. Counsel for the Plaintiff to the Id. Counsel for the Defendants, along with an authorisation.

24. It is made clear that if the said payment is not made as set out above, the Plaintiff is at liberty to approach this Court for seeking proper action, in accordance with law, for the violation the orders of this Court by the

Defendants.

25. In case the Defendants are found to be in violation of the orders of this Court once again, damages to the tune of Rs. 1,00,00,000/- would be liable to be paid by the Defendants to the Plaintiff. Accordingly, the machinery of the Defendants is directed to be de-sealed.

26. The Defendants shall ensure that the proposed label and mark of their product are not in any manner identical or deceptively/ confusingly similar to that of the Plaintiff. The new label and the mark which would be adopted by the Defendant shall be given to the Plaintiff, within ten days from today. Copy of the same shall be filed with the Registry and be tagged along with the electronic record of the present suit.

27. In the contempt petition being **CONT.CAS(C)290/2022**, the present order shall be placed before the concerned Court, and the Id. Counsel for parties submit that in the said matter a date beyond 30th September, 2022, shall be requested.

28. Decree sheet be drawn accordingly. All pending applications are also disposed of.

29. The next date of hearing stands cancelled.

PRATHIBA M. SINGH
JUDGE

JULY 21, 2022
dj/ss