

\* **HIGH COURT OF DELHI : NEW DELHI**

+ **CS (OS) No.1335/2004**

Judgment reserved on: 16<sup>th</sup> March, 2009

% Judgment decided on : 31<sup>st</sup> March, 2009

Agro Tech Foods Ltd .....Plaintiff  
Through : Mr. Pravin Anand, Adv. with Mr. Dhruv  
Anand, Adv.

Versus

Sudha Churiwal .....Defendant  
Through: None

Coram:

**HON'BLE MR. JUSTICE MANMOHAN SINGH**

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not?  | Yes |
| 3. Whether the judgment should be reported in the Digest?                    | Yes |

**MANMOHAN SINGH, J.**

1. The plaintiff has filed the suit for permanent injunction restraining the defendant, their partners, directors or proprietor etc. from infringing the trademark of the plaintiff 'Sundrop' and for passing off, dilution, rendition of accounts, damages and delivery up etc.

2. The Plaintiff submits that it is a company duly incorporated in 1986 and is among the leading manufacturers, processors and sellers of edible oil under the well known trademark 'Sundrop', which was originally adopted by M/s ITC Limited in 1988. The Plaintiff and its predecessors got the trademark 'Sundrop' registered and various devices

of the same with regard to refined sunflower oil including Registration No. 482516 of Class 29 [TMJ # 1198(s)] and many others.

3. By virtue of a Deed of Assignment dated 16.10.97, all the 'Sundrop' trademarks and devices were assigned in favour of M/s ITC Agro Tech Ltd. which was later changed to Agro Tech Foods Ltd.

4. The Plaintiff further submits that due to long and continuous usage and extensive marketing, the trademark 'Sundrop' has garnered immense goodwill and has become a well-known trademark as per the definition in Section 11(6) of the Trade Marks Act, 1999.

5. It is submitted that in April, 2004 the Plaintiff Company came to know that the Defendant had applied for registration of a trademark identical to 'Sundrop' by TM application No. 1163369 in Class 25. The Plaintiff avers that the defendant's trademark comprises of a mark SUNDROP with a photo of sunflowers, which is deceptively similar to his trademark registered under No. 492124 in Class 29. The Defendant has also applied for the trademark 1164563 in Class 25 with respect to 'Sundrop Bond'. The Defendant's packaging material allegedly bears a representation that 'Sundrop' is a registered trademark of the Defendant and the same is an offence under Section 107 of the Trade Marks Act, 1999.

6. The defendant filed their written statement wherein it is alleged that the defendant has started their business in the year 1999 and are dealing in hoisery goods like vests, undergarments etc which are made of cotton. At the initial stage, it has a good market but after passing of the interim order by this court, the market for the defendant's

goods and their reputation deteriorated and ultimately within a short span of time its entire business collapsed. The defendant has also raised certain other defences vis-à-vis the nature of the business of the plaintiff and defendant having no relationship with the plaintiff at all. It is contended that the plaintiff has no locus standi to file the present suit for different products dealt with by the parties.

7. This Court vide order dated 13<sup>th</sup> July, 2005 passed an ex-parte ad-interim order against the defendant restraining him from using the trademark 'Sundrop'. The ex-parte ad-interim order was confirmed by this court on 12<sup>th</sup> July, 2007 when the defendant was proceeded ex parte.

8. The plaintiff produced the evidence by way of the affidavit of Sh. Phani Nangipudi, Acting company Secretary of the plaintiff. In the affidavit, the statement of sale and advertisement figures bearing the mark 'Sundrop' from the year 2002-03 to 2007-08 have been given and proved vide Ex.P-1. The original carton of the defendant has also been proved by the plaintiff which is marked as Ex.P-2. The original invoice filed by the plaintiff in support of the application for contempt is marked as Ex.P-3. The packaging of the defendant's product in the contempt of court application is also filed as Ex.P-4. It is mentioned in the affidavit that the defendant is trading upon the goodwill and reputation of the well known trade mark in relation to hosiery goods thereby passing off its goods as emanating from the business of the plaintiff which amounts to unfair trade practice/unfair trade competition. Such use will create

confusion in the minds of the customers and will reduce capability to identify and distinguish the goods of the plaintiff company and the defendant as to its origination from the same source. It is further stated that in case the defendant is allowed to carry on the said activities, the plaintiff will suffer damages.

9. During the course of the hearing, the learned counsel for the plaintiff has given up the relief of damages as well as rendition of accounts and delivery up of the goods as referred in sub para (iv),(v) and (vi) of Para 20 of the plaint. He has referred to the judgment of the Apex court in the case of ***Durga Dutt Sharma v. Navaratna Pharmaceuticals Laboratories*** AIR 1965 SC 980 at Page 989, by making the submission that in case this court comes to the conclusion that the mark used by the defendant is identical with, no further evidence is required. Para 29 of this judgment is reproduced below:-

**“29.** When once the use by the defendant of the mark which is claimed to infringe the plaintiff’s mark is shown to be “in the course of trade”, the question whether there has been an infringement is to be decided by comparison of the two marks. Where the two marks are identical no further questions arise; for then the infringement is made out. When the two marks are not identical, the plaintiff would have to establish that the mark used by the defendant so nearly resembles the plaintiff’s registered trade mark as is likely to deceive or cause confusion and in relation to goods in respect of which it is registered (Vide Section 21). A point has sometimes been raised as to whether the words “or cause confusion” introduce any element which is not already covered by the words “likely to deceive” and it has sometimes been answered by saying that it is merely an extension of the earlier test and does not add very materially to the concept indicated by the earlier words “likely to deceive”. But this apart, as the question arises in an action for infringement the onus would be on the plaintiff to establish that the trade mark used by the defendant in the course of trade in the goods

in respect of which his mark is registered, is deceptively similar. This has necessarily to be ascertained by a comparison of the two marks — the degree of resemblance which is necessary to exist to cause deception not being capable of definition by laying down objective standards. The persons who would be deceived are, of course, the purchasers of the goods and it is the likelihood of their being deceived that is the subject of consideration. The resemblance may be phonetic, visual or in the basic idea represented by the plaintiff's mark. The purpose of the comparison is for determining whether the essential features of the plaintiff's trade mark are to be found in that used by the defendant. The identification of the essential features of the mark is in essence a question of fact and depends on the judgment of the Court based on the evidence led before it as regards the usage of the trade. It should, however, be borne in mind that the object of the enquiry in ultimate analysis is whether the mark used by the defendant as a whole is deceptively similar to that of the registered mark of the plaintiff.

10. In support of another contention that the goods of the defendant are totally different, the learned counsel for the plaintiff has referred to the case of **Sunder Parmanand Lalwani and Ors. Vs. Caltex (India) Ltd** reported in **AIR1969Bom24** wherein it was held that :-

“49. In this case, the goods are totally different. There is no trade connection between them There is no connection in the course of trade nor any common trade channels. There are factors against holding that there would be any danger of deception or confusion. But we must consider the factors which tend to show that there is a likelihood of creating deception or confusion. The opponents have been using their mark on a very large scale since 1937. Their sales in 1956 exceeded Rs. 30 crores. Their publicity is wide spread and large. In 1956 they spent over a million rupees on advertisements. The goods in respect of which they use the trade mark "Caltex" are mainly petroleum, kerosene and lubricants like greases and oils etc. The goods in respect of which the applicant seeks registration are mainly watches. The class of goods

in respect of which the applicant seeks registration is wider than watches and watches can be both costly and cheap. It cannot go without notice that the goods in respect of which the applicant in fact used the mark before he applied for registration were very cheap watches. The goods of the opponents are used by persons all over India, in cities and in villages, in different walks of life, rich or poor, literate or illiterate. The goods of the applicant are different in nature. But they are watches. They can be cheap watches. The potential market for them is, therefore, similar to that of the existing market of the opponents, in the sense that the goods of both the parties are not special goods. They are goods which would be purchased by the common man. Now, so far as the word "Caltex" is concerned, it is common to the opponent's mark as also to the opponents' name. To mention the mark "Caltex" is also to mention the name of the owner. The mark is unlike the Lion or the "Stag" mark where there would be no direct connection between the mark and the name of its owner. The opponents are a large company known by many as having large resources, and therefore, capable of starting any new industry or trade. Because of that reason, there is a greater probability of the public believing that any goods with the mark "Caltex" on them would be the goods of the opponents.

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On the facts of this case, we have no hesitation in holding that a large number of persons, if they see or hear about the mark "Caltex" in connection with watches, would be led to think that the watches were in some way connected with the opponents, or they would at least wonder whether they were in any way connected with the opponents. Persons seeing the mark attached to watches, which is a new class of goods, would assume, or are most likely to assume, that they originated from the proprietor of the mark, namely, the opponents.

11.            In view of my above discussion and well settled law on the subject, it is clear that the plaintiff has been able to establish its case for infringement of trademark and passing off. It has also been established by the plaintiff that 'Sundrop' is a coined word and is a well known trade mark of the plaintiff within the meaning of Section 11 of the Act.

12. Considering the overall circumstances of the matter, a decree for permanent injunction is passed in favour of the plaintiff and against the defendant restraining the defendant from using the trade mark 'Sundrop' in respect of hosiery goods including Vests, Undergarments or any other product or services bearing the mark 'Sundrop'. The suit is thus decreed in terms of Para 20(i), (ii) and (iii) accordingly. Decree be drawn in favour of the plaintiff. No costs.

**MANMOHAN SINGH, J**

**MARCH 31, 2009**  
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