

HIGH COURT OF DELHI**Bench: Justice Prathiba M. Singh****Date of Decision: October 16, 2023**

CS(COMM) 512/2023 & I.A. 20372/2023

RED BULL AG**..... Plaintiff****versus****ROHIDAS POPAT KAPADNIS & ANR.****..... Defendants****Sections, Acts, Rules, and Article:**

Trademarks Act

Subject: Trademark Infringement - Protection of 'RED BULL' trademark for energy drinks - Injunction against Defendants' use of a similar color combination for 'SEVEN HOURS' energy drink - Disposition of seized goods - Award of damages and costs - Withdrawal of Defendants' trademark applications - Use of 'SEVEN HOURS' mark.

Headnotes:

Trademark Infringement - Plaintiff, Red Bull AG, asserts ownership of the 'RED BULL' trademark for energy drinks - International recognition of the mark - Defendants use an identical silver and blue color combination for 'SEVEN HOURS' energy drinks - Plaintiff seeks protection - Court grants an ad-interim ex-parte injunction against Defendants' manufacturing with the similar color combination and on e-commerce platforms. [Para 2-10]

Seizure and Disposition - Filled cans permitted to be disposed of by the Defendants with conditions - Unfilled cans to be destroyed - Defendants agree to suffer a decree - Permission to fill unfilled cans and sell them, subject to payment of monetary damages to the Plaintiff. [Para 12-16]

Decree and Trademark Applications - Court decrees the suit in favor of Plaintiff for damages and costs - Withdrawal of Defendants' trademark applications - Plaintiff allows Defendants to use the 'SEVEN HOURS' mark - Refund of court fees. [Para 17-19]

Referred Cases: None.


Representing Advocates:

Plaintiff's Counsel: Mr. Anirudh Bakhru, Ms. Neeharika Chauhan, Ms. Vijay Laxmi Rathi, Ms. Apurva Bhutani

Defendants' Counsel: Mr. Umesh Mishra, Mr. Satish Kumar


Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.
2. The present suit has been filed by the Plaintiff - Red Bull AG, a Swiss company, claiming to be the owner/proprietor of the internationally wellknown mark 'RED BULL'. The said mark was adopted by the Plaintiff in the year 1982 and is used for energy drinks in a large number of variants. 'RED BULL' was first launched in Austria in the year 1987. The case of the Plaintiff is that the said products are distributed and sold in more than 173 countries around the world.
3. In India, the 'RED BULL' energy drink is stated to have been launched in 2000 through a national distribution and marketing partner. However, sometime in 2007, the Plaintiff incorporated an Indian subsidiary namely Red Bull India Pvt. Ltd. and started operating through it.
4. The marks of the Plaintiff include 'RED BULL', 'BULL', the double BULL device, single BULL device as also the blue and silver colour combination in a trapezial design on the Plaintiff's can packaging. The case of the Plaintiff is that the blue and silver colour combination in the distinctive layout and arrangement is exclusively associated with the Plaintiff. The Plaintiff also claims that the blue and silver colour combination has been used in a large number promotional advertising material. The said colour combination is registered in India as also a large number of countries, as a trade mark, details of the same are set out in the plaint. The relevant Indian registrations of the blue and silver colour combination are set out below:

| | | | | |
|----|---|---------|------------|----|
| 5. |  | 1203997 | 04/06/2003 | 32 |
|----|---|---------|------------|----|

Goods:


Non alcoholic beverages including refreshing drinks, energy drinks, whey beverages and isotonic (hyper and hypotonic), drinks (for use and/ or as required by athletes), beer, malt beer, wheat beer, porter, ale, stout and lager, non alcoholic malt beverages, mineral water and aerated waters, fruit drinks and fruit juices, syrups, essences and other preparations for making beverages as well as effervescent (sherbet) tablets and powders for drinks and non alcoholic cocktails.

| | | | | |
|----|---|---------|------------|----|
| 6. |  | 1203994 | 04/06/2003 | 32 |
|----|---|---------|------------|----|

Goods:

Non alcoholic beverages including refreshing drinks, energy drinks, whey beverages and isotonic (hyper- and hypotonic) drinks (for use and/or as required by athletes); beer, malt beer, wheat beer, porter, ale, stout and lager; non alcoholic malt beverages; mineral water and aerated waters; fruit drinks and fruit juices; syrups, essences and other preparations for making beverages as well as effervescent (sherbet) tablets and powders for drinks and non alcoholic cocktails.

Colour Claim: The mark shall be limited to the colours BLUE AND SILVER as shown in the representation on the form of the Application.

| | | | | |
|----|---|---------|------------|----|
| 7. |  | 5037338 | 09/07/2021 | 32 |
|----|---|---------|------------|----|







Goods:

Energy Drinks

Colour Claim: The applicant claims the colours blue (Pantone 2747 C) and silver (Pantone 877 C) as depicted on the representation as a feature of the mark. The mark is an abstract colour combination and the applicant is not seeking rights over the two panels.



5. The sales of the Plaintiff in India are more than Rs.180 crores in the year 2022 with the market share being pegged at 44.2% in the energy drink segment.

6. In the present case, the Plaintiff is aggrieved by the Defendants' adoption of an identical silver and blue colour combination for identical energy drinks. The Defendants are manufacturing and marketing the said energy drink under the mark 'SEVEN HOURS'. The comparative products and packaging of the Plaintiff and the Defendants are set out below:

| | | |
|---------|---|--|
| Label |  |  |
| Device |  |  |
| Product |  |  |

7. Mr. Anirudh Bakhru, Id. counsel appearing for the Plaintiff submits that in the past, colour combination of blue and silver for energy drink has been protected by the Courts in various orders. Illustratively, details of some of the orders protecting the Plaintiff's silver and blue colour combination are set out below:

| S. No. | Suit Particulars | Offending Mark | Products/Services |
|--------|---|--|-------------------|
| 1. | <p>CS(COMM)No. 798/2016 [CS(OS)931/2015] before High Court of Delhi titled Red Bull AG v. Universal Nutritious Products Pvt. Ltd. & Anr.</p> |  | Energy Drink |
| 2. | <p>CS(COMM) 351/2021 before High Court of Delhi titled as Red Bull AG v. Dugar Overseas Pvt. Ltd. & Anr.</p> <p>CONT.CAS(C).8 28/ 2022 titled as Red Bull AG v. Dugar Overseas Pvt. Ltd. through its Director Mr. Nagral Dugar & Ors.</p> |  | Energy Drink |

| | | | |
|-----------|---|---|---------------------|
| <p>3.</p> | <p>CS (COMM) 360/2022 before the High Court of Delhi titled Red Bull AG v. AKC (Pvt.) Limited & Ors.</p> |  | <p>Energy Drink</p> |
| <p>4.</p> | <p>CS (COMM) 203/2023 before the High Court of Delhi titled Red Bull AG v. Vandana Chetankumar Maraviya trading as Vandana Beverages & Ors.</p> |  | <p>Energy Drink</p> |

8. It is averred by Id. counsel for the Plaintiff that the Defendants are based in Maharashtra and carry out bottling operations in Kerala. Further, the Defendants products are being sold on various e-commerce platforms including on Flipkart. The Plaintiff has been able to purchase such a product, has produced the same before the Court when the suit was listed for the first time.

9. The Plaintiff's case was that the Defendants are also promoting their products on the social media including on Instagram, YouTube, etc. Some of the videos surfaced on YouTube would show that one of the reviewers, in fact, claims that the Defendants' product is similarly branded to 'RED BULL'. Since the products are being sold in Delhi and are being promoted in Delhi, it was averred that the Defendants are purposefully availing the jurisdiction.
10. The suit was listed on 1st August, 2023 - on which date, after hearing the Id. Counsel for the Plaintiff, the following order was passed:

*"24. Firstly on jurisdiction, the facts submitted above would clearly show that the test of 'purposeful availment' laid down in the **Banyan Tree Holdings Ltd.***

***v. M. Murali Krishna Reddy, CS(OS) 894/2008** decision is completely satisfied. The Defendants have clearly adopted silver and blue colour combination, identical to that of the Plaintiff, which is evident from the physical products. The products being identical, the fact that the Plaintiff has registrations for the specific trapezoidal pattern would show that the colour combination of blue and silver is enjoying statutory protection in favour of the Plaintiff. On the other hand, the Defendants' application for registration of the mark 'SEVEN HOURS' has been filed only on 15th November, 2022 in class 32 on a proposed to be use basis. The Plaintiff is stated to have opposed one of the trademark applications of the Defendants.*

25. In the present case, the mark being used by the Defendants is 'SEVEN HOURS'. However, since the segment and the colour combination of the Defendants is identical to that of the Plaintiff, the chances of confusion are very high, especially on e-commerce platforms where the images are not fully visible and could be subject to the fleeting memory of consumers.

26. In view of the trademark registrations of the Plaintiff and the long and continuous use by the Plaintiff, the Court is convinced that the Plaintiff has made out a prima facie case in its favour for grant of an ad-interim ex-parte injunction. The balance of convenience lies in favour of the Plaintiff and irreparable injury would be caused to the Plaintiff if the interim

injunction is not granted. Thus, in the facts of this case, the following directions are issued:

(i) the Defendants, their dealers, distributors, franchisees, manufacturers etc., as also anyone else acting on their behalf shall stand restrained from any fresh manufacturing of 'SEVEN HOURS' energy drink in cans/packaging having blue and silver colour combination, which is a colourable imitation and slavish reproduction of the Plaintiff's products' colour combination, packaging, get up and layout. The Defendants are free to use the mark SEVEN HOURS for their products so long as the packaging is not similar and violative of the Plaintiffs' rights;

(ii) insofar as the existing inventory is concerned, since the Defendants' products have been recently launched, the Defendants shall place on record an affidavit giving the complete details of the total sales made by them and their distributors since the day of launch."

11. A Local Commissioner was also appointed in this matter to effect the seizure of the infringing products. The Defendants then moved an application seeking release of the said goods which were seized during the Commission by the Local Commissioner. The said application was then considered on 26th September, 2023 and the following directions were issued:

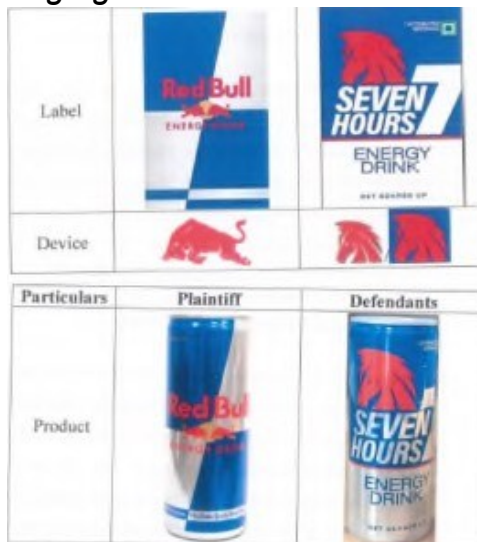
"I.A.18907/2023 (for release of goods)

2. This is an application filed by the Defendants seeking release of the seized goods by the Local Commissioner during the raid.

3. The present suit has been filed by the Plaintiff- Red Bull AG seeking permanent injunction restraining the Defendant Nos. 1 & 2- Mr. Rohidas Popat Kapadnis and Blue Marine Bottling Company from using deceptively similar/identical marks as that of the Plaintiff's trademarks i.e., RED BULL, including device, trade dress, logo, domain name or trade name.

4. The present suit relates to energy drinks. In the present case, the Plaintiff had objected to the get up, layout as also

the blue and silver colour combination in a trapezoidal design used by the Defendants for its 'SEVEN HOURS Energy drink'. A comparative table of the Plaintiff and Defendants product and packaging is set out below:



5. An ex parte injunction was granted on 1st August, 2023 and a Local Commissioner was also appointed directing seizure. The Defendants have moved this present application seeking permission to release and dispose of the existing cans which have been seized by the Local Commissioner vide order dated 1st August, 2023.

The total seizure made by the Local Commissioner is as under:

| TRADEMARK | QUANTITY OF FILLED CANS | QUANTITY OF UN-FILLED CANS | EMPTY CARTONS |
|--------------------|--------------------------------|-----------------------------------|----------------------|
| SEVEN HOURS | 20,628 | 1,66,175 | 2,800 |

6. After hearing the submissions of the parties, this Court is of the opinion that since the cans which have been filled already, would have to be completely destroyed, if the permission is not given, this Court is inclined to permit the manufactured goods consisting of 20,628 cans to be disposed of as part of day-to-day business. The filled cans shall be disposed of after checking the expiry date of the products. Insofar as the un-filled cans and empty cartons are concerned, the same shall be destroyed.

7. *In order to give effect to this order, one representative of the Plaintiff shall visit the Defendant No.2's premises on 14th October, 2023 and 15th October, 2023. The address of Defendant No.2's premises is as under:*

18/955, Uliyathadka, Post Madhur, Kasargod, Kerala, 671124, India

8. *After the inspection of the inventoried goods, by the Plaintiff's representative has taken place, the Defendants are permitted to dispose of all the filled cans by 31st December, 2023 and within the same time period, the amount of Rs.3 lakhs shall be deposited with the Registrar General of this Court. The said amount shall be kept in an FDR on auto-renewal mode."*

12. As per the above order, the filled cans were permitted to be disposed of by the Defendants by 31st December, 2023 and Rs.3 lakhs was to be deposited with the Registrar General of this Court by the said date.
13. Today, the matter is listed for further consideration. It is the submission of the Defendants that unfilled cans are also quite expensive and the Defendants have been selling these products since 2021.
14. The Court has also perused the cans which have been produced before the Court and a large quantity of unfilled cans would be required to be destroyed if the permission to dispose of the unfilled cans is not given. In I.A. 20372/2023, the Defendants have already agreed to suffer a decree. This Court is of the opinion that considering the fact that the Defendants have been using the impugned cans for the last two years, they can be given permission to fill the unfilled cans and sell the same, during usual course of business, subject to payment of monetary damages to the Plaintiff. It is also noted that no complaint has been raised as to the safety of the products sold by the Defendants.
15. Accordingly, the seized products consisting of 1,66,175 empty cans are permitted to be filled and disposed of in the course of business, subject to payment of a further sum of Rs.10 lakhs. No further products shall be sold by the Defendants under the infringing marks and labels except the

filled and unfilled cans which were seized by the Local Commissioner. The unfilled cans which have been seized, shall be released in favour of the Defendants, which were given to them on *superdari basis*, in the presence of a representative of the Plaintiff. The Plaintiff's representative may accordingly visit the Defendants' premises on 1st November, 2023 at 11:00 a.m. On the said date, all seized products shall be unsealed and given to the Defendants. The Defendants shall pay a sum of Rs.13 lakhs to the Plaintiff on or before 31st January, 2024. The said amount shall be paid in the following manner:

- i. Amount of Rs.6.5 lakhs shall be paid by 31st December, 2023
 - ii. The remaining amount i.e., Rs.6.5 lakhs shall be paid by 31st January, 2024.
16. Insofar as the unfilled cans which are now to be disposed of are concerned, the time for disposing of the same is given till 31st January, 2024. Any goods which are not disposed of by 31st January, 2024, shall be destroyed by the Defendants.
 17. The suit is decreed in terms of paragraphs 73(a) and (c) of the plaint. The suit is also decreed for damages and cost of Rs.13 lakhs which shall be payable as per the above schedule. If the amounts are not paid, the Plaintiff is given liberty to revive the suit for the purpose of claiming damages/rendition of accounts.
 18. The Defendants trademark applications bearing nos. 5683132 and 5598032 shall stand withdrawn. The Registrar of Trademarks shall reflect the same on its website within four weeks from receipt of the order.
 19. Insofar as the mark 'SEVEN HOURS' is concerned, the Plaintiff has no objection in the same being used by the Defendants.
 20. Decree sheet be drawn accordingly.

21. 50% of the court fee is directed to be refunded in the name of Id. Counsel to Plaintiff subject to an email being produced from the client that the amount can be remitted to the counsel.
22. Next date of hearing stands cancelled.

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