COMPANIA GENERAL DE TABACOS DE FILIPINAS AND LA FLOR DE LA ISABELA, INC., PETITIONERS, HON. VIRGILIO A. SEVANDAL, AS DIRECTOR AND DTI ADJUDICATION OFFICER, ATTY. RUBEN S. EXTRAM...

G.R. No. 161051. July 23, 2009

Ponente: VELASCO JR., J.

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VELASCO JR., J.:

The Case

This Petition for Review on Certiorari under Rule 45 seeks the reversal of the June 16, 2003 Decision[1] and December 1, 2003 Resolution[2] of the Court of Appeals (CA) in CA-G.R. SP No. 42881. The CA denied petitioners' Petition for Certiorari (With Urgent Application for Temporary Restraining Order and/or Writ of Preliminary Injunction) and their motion for reconsideration.

The Facts

Petitioner Compania General de Tabacos de Filipinas, also known as "Tabacalera," is a foreign corporation organized and existing under the laws of Spain. It is the owner of 24 trademarks registered with the Bureau of Patents, Trademarks and Technology Transfer (BPTTT) of the Department of Trade and Industry (DTI). Tabacalera authorized petitioner La Flor de la Isabela, Inc. to manufacture and sell cigars and cigarettes using the Tabacalera trademarks.

Respondent Gabriel Ripoll, Jr. was an employee of petitioners for 28 years and was the General Manager before he retired sometime in 1993.[3] In the same year, Ripoll organized Tabaqueria de Filipinas, Inc. (Tabaqueria), a domestic corporation also engaged in the manufacture of tobacco products like cigars.[4] Ripoll is the managing director of Tabaqueria.

On October 1, 1993, petitioners filed a Letter-Complaint[5] with the Securities and Exchange Commission praying for the cancellation of the corporate name of Tabaqueria on the following ground:

> Tabaqueria, being engaged in the same business as Tabacalera, cannot be allowed to continue using "tabaqueria" which will confuse and deceive the public into believing that Tabaqueria is operated and managed by, and part of, Tabacalera and that its business is approved, sponsored by, and affiliated with, Tabacalera.

Thereafter, petitioners also filed with the Department of Justice (DOJ)-Task Force on Anti-Intellectual Property Piracy a criminal complaint against Ripoll for Infringement of Trademark and Unfair Competition for violation of Articles 188 and 189 of the Revised Penal Code. The case was docketed as I.S. No. 94C-07941, entitled Compania General de Tabacos de Filipinas & La Flor de la Isabela, Inc. (Attys. Ferdinand S. Fider and Ma. Dolores T. Syquia v. Gabriel Ripoll, Jr. (Tabaqueria de Filipinas, Inc.).

On February 8, 1994, petitioners filed with the DTI a Complaint dated February 4, 1994[6] for Unfair Competition, docketed as Administrative Case No. 94-19 and entitled Compania General de Tabacos de Filipinas

and La Flor de la Isabela, Inc. v. Tabaqueria de Filipinas, Inc. and Gabriel Ripoll, Jr.

Petitioners alleged in the Complaint that Tabaqueria deliberately sought to adopt/simulate the Tabacalera trademarks to confuse the public into believing that the Tabaqueria cigars are the same or are somehow connected with the Tabacalera products.[7]

In the Complaint petitioners sought, among others, the issuance of a "preliminary order requiring respondents to refrain from manufacturing, distributing and/or selling the Tabaqueria products."[8]

In their Answer dated April 9, 1994, Tabaqueria and Ripoll opposed the issuance of injunctive relief pending investigation on the ground that petitioners' allegation of unfair competition is unproved and unsubstantiated. They alleged that petitioners failed to establish the following elements required for the issuance of an injunctive writ:

> The party applying for preliminary injunction must show (a) The invasion of the right sought to be protected is material and substantial; (b) The right of complainant is clear and unmistakable; and (c) There is an urgent and paramount necessity for the writ to prevent serious damage. (Director of Forest Administration vs. Fernandez, 192 SCRA 121 [1990]; Phil. Virginia Tobacco Administration vs. De los Angeles, 164 SCRA 543 [1988])[9]

Meanwhile, on September 1, 1994, the DOJ issued a Resolution[10] in I.S. No. 94C-07941, the dispositive portion of which reads:

> Accordingly, it is hereby recommended that the complaint for unfair competition and/or infringement of trademark be dismissed against respondent Gabriel Ripoll Jr. for insufficiency of evidence.

Petitioners moved reconsideration of the above resolution, but their motion was denied in a Letter dated October 18, 1994.[11] Later, the Secretary of Justice reversed the Resolution dated September 1, 1994. Upon reconsideration, the Secretary, however, issued a Letter dated February 5, 1997[12] reaffirming the Resolution dated September 1, 1994.

On March 24, 1995, petitioners filed a Motion to Issue Cease and Desist Order[13] with the DTI, praying for the issuance of an order: (1) directing private respondents to immediately cease and desist from manufacturing, distributing, and selling cigar products bearing the marks and design of petitioners; (2) for the immediate seizure of all cigar products of private respondents bearing the marks and design of petitioners; and (3) for the immediate closure of private respondents' establishment involved in the production of those products.

In response, private respondents filed an Opposition to Complainants' Motion to Issue Cease and Desist Order, with Motion to Dismiss Complaint dated March 30, 1995.[14] Private respondents anchored their motion to dismiss on the ground of forum shopping due to petitioners' filing of prior cases of infringement and unfair competition with the DOJ. As to the Motion to Issue Cease and Desist Order, private respondents claimed that such motion was premature considering that the alleged evidence for the issuance of the order was just then marked. Moreover, they alleged that the acts that petitioners sought to be restrained would not cause irreparable injury to them.

Subsequently, the DTI issued a Temporary Restraining Order dated September 18, 1995[15] with a validity period of 20 days from receipt by private respondents.

In an Order dated April 30, 1996, the Office of Legal Affairs of the DTI ruled that there was no similarity in the general appearance of the products of the parties and that consumers would not be misled. In the same order, the DTI partially granted petitioners' prayer for the issuance of a writ of preliminary injunction. The pertinent portions of the DTI Order state:

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DETERMINATION OF SIMILARITY IN GENERAL APPEARANCE AND LIKELIHOOD OF CONFUSION; PRODUCT COMPARISON; USUAL PURCHASER

x x x [L]et us now determine if there is similarity in general appearance between Tabacalera products and Respondents' products, such that it will likely mislead, confuse or deceive the usual purchasers of cigars into buying Respondents' products thinking that what they are buying are the Tabacalera products they intended to buy.

The competing products should be viewed in their totality. But certain features, have to be excluded first. That is what the Supreme Court did in determining similarity between SAN MIGUEL PALE PILSEN (of San Miguel Corporation) and BEER PALE PILSEN (of Asia Brewery, Inc.) in the case of Asia Brewery, Inc. vs. C.A. and San Miguel Corp. (G.R. No. 103543, prom. July 5, 1993). In said case, the Supreme Court found that the two competing beer products have certain features in common. Therefore, the two competing products are similar as far as those features are concerned. But the Supreme Court excluded said features. Apparently the Court wanted to distinguish between "similarity as a matter of fact" and "similarity as a matter of law", the latter having a limited scope considering the many exclusions that have to be made. Hereunder are the said features and the reasons cited by the Supreme Court for their exclusion:

COMMON FEATURES

REASONS FOR EXCLUSION

1. The container is steinie bottle.

It is a standard type of bottle and therefore lacks exclusivity. It is of functional or common use. It is universally used.

2. The color of the bottle is amber.

It is a functional feature. Its function is to prevent the transmission of light into the said bottle and thus protect the beer inside the bottle.

3. The phrase "pale pilsen" is carried in their respective trademark.

This phrase is a generic one even if included in their trademarks.

4. The bottle has a capacity of 320 ML and is printed on the label.

It is a metrication and standardization requirement of the defunct Metric System Board (now a function of the Bureau of Product Standards, DTI).

5. The color of the words and design on the label is white.

It is the most economical to use on the label and easiest to bake in the furnace. Hence, a functional feature.

6. Rectangular shape of the label.

It is the usual configuration of labels.

7. The bottle's shape is round with a neck.

It is commonly and universally used.

In the same case of Supreme Court stated the following, citing Callman, Unfair Competition, Trademarks and Monopolies:

"Protection against imitation should be properly confined to non-functional features. Even if purely functional elements are slavishly copied, the resemblance will not support an action for unfair competition, and the first

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> user cannot claim secondary meaning protection. Nor can the first user predicate his claim in reliance of any such unpatented functional feature, even at large expenditure of money."

Following the Supreme Court's way of determining similarity, OLA will exclude the features which arise from industry practices of cigar manufacturers worldwide, features commonly used by cigar manufacturers, standard features, functional features, features arising from labeling rights and obligations, and generic words and phrases. All of these features have been listed and/or discussed above. Now this needs clarification. When we say that we are excluding the logo because it is a functional and universal feature, what we mean to say is that, the fact that both products bear a logo (and therefore they are similar in that respect), will be excluded; but the design, words, drawings of the respective logo of the contending parties will be considered. This clarification is also true for the other excluded features.

Before we view the products in their totality, we will first compare the products as to their respective details. The competing products of the Parties consist of around thirty-two (32) wooden boxes. We note the following glaring differences/distinctions:

1. As to the logo engraved on the top and/or back of the cover of the box:

TABACALERA'S:

Tabacalera uses two variants of their logo, one for the ordinary plywood boxes and another for the narra boxes. The logo on the ordinary plywood box is as follows:

There are word/phrases thereon, namely:

1st line - the brand "TABACALERA" (in big letters);
2nd line - the representation "THE FINEST CIGARS SINCE 1881";
3rd line - the representation "HAND MADE 100% TOBACCO";
4th line - the address "MANILA, PHILIPPINES";
5th line - the code "A-4-2".

Between the 2nd line and 3rd line is inscribed the crest and coat of arms of Tabacalera which consists of a shield placed vertically, and divided into 4 parts with inscriptions/drawings in each part. Within the center of the shield is an oval vertically placed with drawings in it. The crest consists of the uppermost part of a watchtower used in ancient times in watching for enemies coming.

As regards the logo on the narra boxes, it is oblong or egg-shaped, in two parallel lines interrupted at its sides with semi-oblong two parallel lines and inscripted within such latter parallel lines on the left side is "100% TABACO" and on the right side "HECHO A MANO". On the lower portion between the oblong lines are the words "COMPANIA GENERAL DE TABACOS DE FILIPINAS - MANILA, PHILIPPINES, A-4-2". Within the center of the smaller oblong is inscribed the crest and coat (described already above). At each side of the crest/coat are tobacco leaves tied together. On top of the crest is the corporate name "LA FLOR DE LA ISABELA" and this makes the logo confusing because it does not explain the respective role of the two firms mentioned in the logo, such as which one is the manufacturer, the distributor, the licensor, licensee, and trademarks owner.

RESPONDENTS':

A bar curved into a U-shape. It is flanked at the bottom and on its sides with tobacco leaves curved into a "U" also and joined together as in a "laurel". Engraved at the center of said bar is the coat consists of a "shield", on top of which is the crest consists of a prince's crown with a cross on top. The "shield" is divided at its center by a line drawn horizontally with small circles marked at intervals. At the upper portion of said dividing line is a rooster

(adopted by Mr. Ripoll from the coat of arms of his clan - Exh. "48") and the lower portion contains three tobacco leaves (representing Mr. Ripoll's 3 sons) joined into one. Encircling the crest and coat is the corporate name "TABAQUERIA DE FILIPINAS, INC." as well as the brand "FLOR DE MANILA". Immediately below the leaves shaped as in a "laurel" is the phrase "HECHO A MANO 100% TOBACO".

2. As to the brand of the product:

TABACALERA'S:

The brand "TABACALERA" is printed in big white Roman letters with black shadows on a red rectangular background, and the latter is set over a gold and red rectangular background with a design which appears to be an inverted letter "Z" leaning to the right side, and said "Z" is used repeatedly forming a "chain" that surrounds the said red background. Said "Z" also fills the left and right sides of the label. The same brand and markings appear on three sides of the box. The back side bears the Government Warning that cigar smoking is dangerous to health.

The brand "FLOR DE MANILA" is not used on Tabacalera's products except on a cardboard pack of cigars, which is just slightly bigger than a pack of 100 mm cigarettes. (Exh. "DD").

RESPONDENTS':

The brand "FLOR DE MANILA" is printed in red letters with black shadows on a white rectangular background, and the latter is set over a gold rectangular background filled with a red design that looks like the letter "P" with its head touching the ground. These brand and markings appear on two sides of the box. The other two sides are occupied by the seal of guaranty and by the said Government Warning.

Both Complainants and Respondents have no trademark registration yet of the brand "Flor de Manila".

3. As to markings on edges of ordinary plywood box:

TABACALERA'S:

The phrase "FLOR FINA" is printed in red Roman letters over a white rectangular background, and the latter is set over a red background with 2 parallel gold lines and the above-mentioned "Z" design in gold used repeatedly forming a straight chain. A tiny company logo colored blue and yellow is marked at intervals.

RESPONDENTS':

The phrase "TABACO FINO" is printed in red letters with strokes that resemble those in Chinese letters, on a white rectangular background, and the latter is set over a gold background with red designs that look like ornate letters "X" and "J". A tiny company logo is marked at intervals.

4. As to "seal of guaranty":

TABACALERA'S:

Colored green and white; with the phrase "REPUBLIC OF THE PHILIPPINES" in big letters and the phrase "sello de garantia de la Flor de la Isabela, Inc."; pasted horizontally at the middle of the left portion of the cigar box if viewed from its top.

RESPONDENTS':

Colored gold and red; with the phrase in big letters "sello de garantia"; bears in big print the company logo; pasted vertically at the middle of the left portion of the cigar box if viewed from its top.

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5. As to predominant colors:

TABACALERA'S:

Red, gold, and green, in that order. Has blue and yellow.

RESPONDENTS':

Gold and red, in that order. No green, blue and yellow.

6. Other differences/distinctions

Tabacalera products have the following features:

- The corporate name "LA FLOR DE LA ISABELA" (engraved on the narra wood boxes; also printed on the seal of guaranty).

- The brand "TABACALERA" surrounded by said "Z" design.

- The representation "THE FINEST CIGARS SINCE 1881".

- The address "MANILA, PHILIPPINES".

- The code "A-4-2".

- The phrase "REPUBLIC OF THE PHILIPPINES" in the seal of guaranty. Below said phrase is a mountain which resembles the mountain printed in the old Philippine money. This appears to be a misrepresentation that the Philippine government is a co-guarantor in the seal of guaranty. This seal of guaranty was possibly copied from the seal of guaranty of Cuban-made boxes of cigars. But in Cuba, the government really guarantees the cigars made in Cuba because cigars are one of the main exports of that country. In the Philippines, the government does not guaranty cigars made in the Philippines.

- The phrase "FLOR FINA" with the said "Z" design.

These seven (7) features are NOT found in Respondents' products.

One of the rules in adjudicating unfair competition cases was laid down by the Supreme Court in the case of Del Monte Corp. vs. C.A. et al. (181 SCRA 410) as follows:

> We note that respondent court failed to take into consideration several factors which should have affected its conclusion, to wit: age, training and education of the usual purchaser, the nature and cost of the article, whether the article is bought for immediate consumption and also the condition under which it is usually purchased. Among those, what essentially determines the attitude of the purchaser, specifically his inclination to be cautious, is the cost of the goods. To be sure, a person who buys a box of candies will not exercise as much care as one who buys an expensive watch. As a general rule, an ordinary buyer does not exercise as much prudence in buying an article for which he pays a few centavos as he does in purchasing a more valuable thing. Expensive and valuable items are normally bought after deliberate, comparative and analytical investigation. But mass products, low priced articles as in wide use, and the matters of everyday purchase requiring frequent replacement are bought by the causal consumer without great care.

Certainly, not everybody buys cigars. Very few people buy cigars for they are expensive, have health implications, and its smoke annoys non-smokers. It is really not the "sari-sari" store variety. OLA takes judicial notice that even big department stores and malls do not ordinarily sell cigars. The usual purchasers of cigars are older people not necessarily an elder or professional, besides those cigar aficionados and cigar lovers, who are able and willing to pay and are capable of discerning the products they buy. Definitely the "impulse buyers"

(those who make a very quick decision (e.g., 6 seconds) to buy a certain product) are not the usual purchasers of cigars.

"The ordinary purchasers must be thought of as having, and credited with, at least a modicum of intelligence to be able to see the obvious differences between the two trademarks in question." (Fruit of the Loom, Inc. vs. C.A., 133 SCRA 405). From this Supreme Court decision we can say that if the buyer can see the obvious differences between two trademarks, there is more reason for him to see the obvious differences of the whole of the two products themselves even if sold at a glance.

Viewing briefly the competing products in their totality, the two are readily distinguished by their respective brand as appearing in the box: "TABACALERA" is the brand of the Tabacalera products while "FLOR DE MANILA" is the brand of Respondents' products. In fact, per Certification of BIR dated March 15, 1994, "Flor de Manila" is the brand registered by the Respondents with said bureau (Annex "B", Answer). The Complainants allege in the Complaint (Par. 1.12) that Respondents are using the word "TABAQUERIA" as the brand of their products. This allegation is belied by an inspection of the boxes of Respondents - none of them shows that the word "TABAQUERIA" was detached from the firm name "TABAQUERIA DE FILIPINAS, INC." and used separately as a brand. Also readily distinguishing the two products are their respective distinctive logo: Tabacalera's logo is quite big and ornate while Respondents' logo is quite small and simple. Their respective seal of guaranty are also conspicuous. Tabacalera's seal of guaranty is colored green and white and pasted horizontally while that of Respondents is colored gold and red and pasted vertically. The other glaring differences between the two, which we have listed above, are revealed at once upon a brief look at the competing products.

Confusion becomes more remote when we consider the usual buyers of cigars. We have already discussed that above. They know their brand and they will not be confused by the various words, marks, and designs on the products. This is specially true for purchasers who have been using Tabacalera products for a long time (Tabacalera products have been available since 1881 [per logo of Tabacalera] or 1917 [per Complaint]), and therefore know very well their favorite brand.

If they switch to Respondents' products, it is not because they are deceived and confused but because they find Respondents' products to their taste.

We should also consider that cigars are expensive. Hereunder are sample prices of Respondents' products (Exhs. "EEE" and "III"):

- Chest Coronas Largas 25 - P/ 619.75

- Corona 50 - 739.75

- Corona Largas 50 - 959.75

- Corona Humidor De Luxe 50 - 1,749.75

Tabacalera products are priced higher. The point we are driving at is that with these high prices (which are like prices of writs watches, electric fans, tape recorders, and other electrical/electronic appliances), the usual purchasers will be cautious in buying and he will give the product he is buying that examination that corresponds to the amount of money that he will part with.

Therefore, there is definitely no similarity in the general appearance of the competing products and hence there is no likelihood that purchasers will be [misled], deceived and confused into buying Respondents' products thinking that they are buying the Tabacalera products that they intended to buy.

Complainants allege in their Complaint that they have been using the trademark (brand) "FLOR DE MANILA"

for their products since 1992. However, Complainants presented only a pack of cigars made by La Flor de la Isabela, Inc., with the brand "Flor de Manila", colored white and gray, and the size is just slightly bigger than a pack of 100 mm. cigarettes. (Exh. "DD"). Buyers cannot possibly make the mistake of buying Respondents' wooden boxes of cigars thinking that what they are buying is this carton pack of cigars of La Flor de la Isabela, Inc.

x x x x

In view of all the foregoing, the injunction prayed for cannot be granted in toto but only partially, i.e., with respect to the barrel type of container, the existence of which has to be explained and justified further by Respondents, and certain features in the packaging which are confusingly similar to the containers/packaging of Complainants' products x x x.[16] (Emphasis supplied.)

The DTI disposed of the complaint this way:

> WHEREFORE:
>
> 1. Respondents are hereby enjoined and restrained from further manufacturing and using the wooden barrel type of container as container for their cigars (typified by Exh. "DDD-1"). However, current stocks thereof, which are in their finished - product state, now in possession of Respondents' distributors or retailers may be sold/disposed of in the ordinary course of business, but those still in the possession of Respondents shall be transferred to the box containers.
>
> 2. In connection with the label used on the sides of the boxes (which contain the dominant colors gold and red), Respondents are ordered to:
>
> a. change either the gold or the red with another color (not blue); or
>
> b. maintain the said gold and red color combination but add another dominant color (not blue). This injunction no. 2 covers only products yet to be manufactured and not products which are already in the possession of Respondents' distributors/retailers. This injunction is for the purpose only of making said label of Respondents very distinct.
>
> 3. In connection with the narra wood boxes, Respondents are ordered to make distinctive and conspicuous etchings/engravings on the top and/or sides of the said bozes. The etchings/engravings thereon (which are stripe/s) shall be transferred to other exterior parts of the boxes or done away with. This injunction no. 3 covers only products yet to be manufactured and not products which are already in their finished-product state and already in the possession of Respondents' distributors/retailers. This injunction is for the purpose only of making said narra wood boxes of Respondents very distinct, hence, the present boxes can no longer be used by Respondents unless the above-stated changes thereon, as herein ordered, are complied with.
>
> x x x x
>
> SO ORDERED.[17]

On June 10, 1996, petitioners filed a Motion for Reconsideration dated June 4, 1996[18] of the above Order contending that: (1) the DTI erroneously passed upon the entire merits of the case where the only pending issue for resolution is the issuance of a preliminary injunction; (2) the findings of facts of the Order are not in accordance with the evidence presented by the parties; and (3) the DTI misapplied the law and jurisprudence applicable on the issues in the instant case. The Motion was denied by the DTI in an Order dated December 10, 1996.[19]

Thus, on December 26, 1996, petitioners filed a Petition for Certiorari (With Urgent Application for Temporary

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Restraining Order and/or Writ of Preliminary Injunction) dated December 19, 1996[20] with the CA. Petitioners raised substantially the same issues as in their Motion for Reconsideration dated June 4, 1996. The case was docketed as CA-G.R. SP No. 42881 entitled Compania General de Tabacos de Filipinas and La Flor de la Isabela, Inc. v. Hon. Virgilio A. Sevandal, as Director and DTI Adjudication Officer, Atty. Ruben S. Extramadura,as Hearing Officer - Office of the Legal Affairs, Department of Trade and Industry, Tabaqueria De Filipinas, Inc. and Gabriel Ripoll, Jr.

The CA, thus, issued the assailed decision dated June 16, 2003 wherein it determined the issues as:

> 1) Whether or not the Order dated April 30, 1996 disposed of the merits of the case; and
>
> 2) Whether or not public respondent committed grave abuse of discretion in refusing to grant petitioners' prayer for injunctive relief.[21]

The CA ruled that the findings of the DTI were premature having passed upon the main issues of the case when the pending incident was only a motion for preliminary injunction. The CA added that the evidence necessary in such a hearing was a mere sampling, not being conclusive of the principal action itself. Thus, the CA ruled that the DTI had prejudged the case and that its findings were premature, to wit:

> By holding thus, public respondent OLA-DTI had pre-judged the main case. In fact, there was practically nothing left for the Hearing Officer to try except for private respondents' claim for attorney's fees.
>
> x x x x
>
> We therefore rule that public respondent OLA-DTI's finding was premature.[22] (Emphasis supplied)

As to the second issue, the CA ruled that the dismissal of the infringement of trademarks and unfair competition case against respondent Ripoll, Jr., renders petitioners' right to an injunctive relief doubtful. Thus, the issuance of an injunction in that case would not be proper. The CA further ruled that petitioners failed to show that there was an urgent and paramount necessity for the issuance of the writ having failed to substantiate their claim that the abrupt drop in the sales of their products was the direct result of the acts of respondents.[23]

Thus, the CA denied the petition.[24]

The petitioners then filed a Motion for Reconsideration dated July 4, 2003[25] to the above decision. This motion was denied for lack of merit in the assailed resolution.

Hence, we have this petition.

The Court's Ruling
This petition must be denied.

The Issues

> I.
>
> The Court of Appeals gravely erred in not declaring the Orders of Public Respondent dated 30 April 1996 and 10 December 1996 as completely null and void for having been rendered with Grave Abuse of Discretion amounting to Lack [or] Excess of Jurisdiction.
>
> II.
>
> The Court of Appeals gravely erred in not ruling that the invasion of/to petitioners' rights are substantial and material.

> III.
>
> The Court of Appeals gravely erred in ruling that the petitioners' right to the exclusive use of the Tabacalera Trademarks and Design was not shown to be clear and unmistakable.
>
> IV.
>
> The Court of Appeals gravely erred in ruling that there is no urgent and paramount necessity for the issuance of a writ of injunction.[26]

The Orders of the DTI were not rendered in grave abuse
of discretion amounting to lack of or in excess of jurisdiction

Petitioners argue that because the CA ruled that the DTI had prejudged the main case, the Decision of the DTI was, therefore, issued in grave abuse of discretion amounting to lack of or in excess of jurisdiction. Thus, petitioners conclude that the DTI Orders dated April 30, 1996 and December 10, 1996 must be considered as null and void.[27]

There is no merit in such contention.

In First Women's Credit Corporation v. Perez,[28] we defined grave abuse of discretion as:

> By grave abuse of discretion is meant such capricious and whimsical exercise of judgment which is equivalent to an excess or lack of jurisdiction. The abuse of discretion must be so patent and gross as to amount to an evasion of a positive duty or a virtual refusal to perform a duty enjoined by law or to act at all in contemplation of law, as where the power is exercised in an arbitrary and despotic manner by reason of passion or hostility.

We further clarified such principle later in Buan v. Matugas:[29]

> There is grave abuse of discretion only when there is a capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction, such as where the power is exercised in an arbitrary and despotic manner by reason of passion and personal hostility, and it must be so patent or gross as to constitute an evasion of a positive duty or a virtual refusal to perform the duty or to act at all in contemplation of law. Not every error in the proceedings, or every erroneous conclusion of law or fact, is grave abuse of discretion. (Emphasis supplied)

Petitioners must prove that the elements above-mentioned were present in the rendering of the questioned Orders of the DTI in order to establish grave abuse of discretion. The mere fact that the CA ruled that the DTI prejudged the main case filed before it does not by itself establish grave abuse of discretion.

Moreover, there is no grave abuse of discretion in the instant case because the DTI merely tried to justify the issuance of the writ of preliminary injunction. Sometimes a discussion in passing of the issues to be resolved on the merits is necessary in order to deny or grant an application for the writ. This cannot, however, be considered as a whimsical or capricious exercise of discretion.

The next three issues shall be discussed simultaneously for being interrelated.

Petitioners failed to establish that
they are entitled to a writ of preliminary injunction

Section 3 of Rule 58 provides for the grounds for the issuance of a preliminary injunction:

> Sec. 3. Grounds for issuance of preliminary injunction. - A preliminary injunction may be granted when it is established:
>
> (a) That the applicant is entitled to the relief demanded, and the whole or part of such relief consists in

> restraining the commission or continuance of the act or acts complained of, or in requiring the performance of an act or acts, either for a limited period or perpetually;
>
> (b) That the commission, continuance or non-performance of the act or acts complained of during the litigation would probably work injustice to the applicant; or
>
> (c) That a party, court, agency or a person is doing, threatening, or is attempting to do, or is procuring or suffering to be done, some act or acts probably in violation of the rights of the applicant respecting the subject of the action or proceeding, and tending to render the judgment ineffectual.

Thus, the Court has repeatedly held that, in order that an injunctive relief may be issued, the applicant must show that: "(1) the right of the complainant is clear and unmistakable; (2) the invasion of the right sought to be protected is material and substantial; and (3) there is an urgent and paramount necessity for the writ to prevent serious damage."[30]

In establishing the above elements, it bears pointing out that the Court used the term "and" in enumerating the said elements. In Mapa v. Arroyo,[31] this Court defined the term "and" as follows:

> In the present case, the employment of the word "and" between "facilities, improvements, infrastructures" and "other forms of development," far from supporting petitioner's theory, enervates it instead since it is basic in legal hermeneutics that "and" is not meant to separate words but is a conjunction used to denote a joinder or union.

While in Republic v. David,[32] we applied the above definition with regard an enumeration of conditions or requisites in this wise:

> The conditions that were allegedly violated by respondent are contained in paragraph 10 of the Deed of Conditional Sale, as follows:
>
> "10. The Contract shall further [provide] the following terms and conditions:
>
> x x x x
>
> (c) The VENDEE, and his heirs and/or successors, shall actually occupy and be in possession of the PROPERTY at all times"
>
> x x x x
>
> The use of the conjunctive and in subparagraph (c) is not by any chance a surplusage. Neither is it meant to be without any legal signification. Its use is confirmatory of the restrictive intent that the houses provided by petitioner should be for the exclusive use and benefit of the SSS employee-beneficiary.
>
> It is easily discernible, therefore, that both "actual occupancy" and "possession at all times" -- not just one or the other -- were imposed as conditions upon respondent. The word and -- whether it is used to connect words, phrases or full sentences -- must be accepted in its common and usual meaning as "binding together and as relating to one another." And implies a conjunction, joinder or union. (Emphasis supplied)

In the instant case, the import of the use of the term "and" means that all of the elements mentioned above must concur in order that an injunctive writ may be issued. The absence of even one of the elements would be fatal in petitioners' application for the writ.

In finding that the third element was absent, that there is no urgent and paramount necessity for the writ to prevent serious damage to petitioners, the CA ruled that:

> Second, petitioners have failed to show that there is an urgent and paramount necessity for the issuance of writ

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> of injunction to prevent serious damage. In Olalia vs. Hizon (196 SCRA 665, 672), the Supreme Court held:
>
> "While, to reiterate, the evidence to be submitted at the hearing on the motion for preliminary injunction need not be conclusive and complete, we find that the private respondent has not shown, at least tentatively, that she has been irrepairably injured during the five month period the petitioner was operating under the trade name of Pampanga's Pride. On this ground alone, we find that the preliminary injunction should not have been issued by the trial court. It bears repeating that as a preliminary injunction is intended to prevent irreparable injury to the plaintiff, that possibility should be clearly established, if only provisionally, to justify the restraint of the act complained against. No such injury has been shown by the private respondent. Consequently, we must conclude that the issuance of the preliminary injunction in this case, being utterly without basis, was tainted with grave abuse of discretion that we can correct on certiorari."

In the case at bench, petitioner failed to substantiate their claim that the abrupt drop in sales was the result of the acts complained of against private respondent.[33] (Emphasis supplied.)

Petitioners claim that as a result of private respondents' "fraudulent and malicious entry into the market, Petitioners' sales dropped by twenty-five [percent] (25%)."[34]

Petitioners further aver that the writ of preliminary injunction is necessary as the general appearance of private respondents' products is confusingly similar to that of petitioners' products. Petitioners claim that this has resulted in a marked drop in their sales. Thus, petitioners argue that unless private respondents use similar marks, packaging, and labeling as that of petitioners' products, they will continue to suffer damages.[35]

Petitioners' postulations are bereft of merit.

Petitioners failed to present one iota of evidence in support of their allegations. They failed to present evidence that indeed their sales dropped by an alleged 25% and that such losses resulted from the alleged infringement by private respondents. Without presenting evidence to prove their allegations, petitioners' arguments cannot be given any merit. Thus, we ruled in Olalia v. Hizon:[36]

> A preliminary injunction is an order granted at any stage of an action prior to final judgment, requiring a person to refrain from a particular act. As the term itself suggest, it is merely temporary, subject to the final disposition of the principal action. The justification for the preliminary injunction is urgency. It is based on evidence tending to show that the action complained of must be stayed lest the movant suffer irreparable injury or the final judgment granting him relief sought become ineffectual. Necessarily, that evidence need only be a "sampling," as it were, and intended merely to give the court an idea of the justification for the preliminary injunction pending the decision of the case on the merits. The evidence submitted at the hearing on the motion for the preliminary injunction is not conclusive of the principal action, which has yet to be decided.

Due to the absence of the third requisite for the issuance of a preliminary injunction, petitioners' application for the injunctive writ must already fail; the absence or presence of the other requisites need no longer be discussed.

Such denial is grounded on the oft-repeated principle enunciated in Vera v. Arca,[37] where this Court held that:

> As far back as March 23, 1909, more than 60 years ago, this Court, in the leading case of Devesa v. Arbes, made the categorical pronouncement that the issuance of an injunction is addressed to the sound discretion of the Court, the exercise of which is controlled not so much by the then applicable sections of the Code of Civil Procedure, now the Rules of Court, but by the accepted doctrines, one of which is that it should not be granted while the rights between the parties are undetermined except in extraordinary cases where material and irreparable injury will be done. For it is an action in equity appropriate only when there can be no compensation in damages for the injury thus sustained and where no adequate remedy in law exists. Such a holding reflected the prevailing American doctrine that there is no power "the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion or more dangerous in a doubtful

> case," being "the strong arm of equity, that never ought to be extended," except where the injury is great and irreparable.

While in Olalia,[38] we reiterated the above ruling, as follows:

> It has been consistently held that there is no power the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion, or more dangerous in a doubtful case, than the issuance of an injunction. It is the strong arm of equity that should never be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages.
>
> Every court should remember that an injunction is a limitation upon the freedom of action of the defendant and should not be granted lightly or precipitately. It should be granted only when the court is fully satisfied that the law permits it and the emergency demands it.

We again ruled in Hernandez v. National Power Corporation:[39]

> At times referred to as the "Strong Arm of Equity," we have consistently ruled that there is no power the exercise of which is more delicate and which calls for greater circumspection than the issuance of an injunction. It should only be extended in cases of great injury where courts of law cannot afford an adequate or commensurate remedy in damages; "in cases of extreme urgency; where the right is very clear; where considerations of relative inconvenience bear strongly in complainant's favor; where there is a willful and unlawful invasion of plaintiff's right against his protest and remonstrance, the injury being a continuing one, and where the effect of the mandatory injunction is rather to reestablish and maintain a preexisting continuing relation between the parties, recently and arbitrarily interrupted by the defendant, than to establish a new relation." (Emphasis supplied)

Clearly, it was incumbent upon the petitioners to support with evidence their claim for the issuance of a preliminary injunction. They failed to do so. Hence, the instant petition must fail.

WHEREFORE, the petition is hereby DENIED. The assailed June 16, 2003 Decision and December 1, 2003 Resolution of the CA in CA-G.R. SP No. 42881 are AFFIRMED. Costs against petitioners.

SO ORDERED.

Ynares-Santiago, (Chairperson), Chico-Nazario, Nachura, and Peralta, JJ., concur.

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[1] Rollo, pp. 38-45. Penned by Associate Justice B.A. Adefuin-De la Cruz and concurred in by Associate Justices Jose L. Sabio, Jr. and Hakim S. Abdulwahid.

[2] Id. at 47.

[3] Id. at 367.

[4] Id. at 67.

[5] Id. at 274-277.

[6] Id. at 48-65.

[7] Id. at 58.

[8] Id. at 63.

[9] Id. at 71-72.

[10] Id. at 258-265.

[11] Id. at 266-267.

[12] Id. at 268-272.

[13] Id. at 84-87.

[14] Id. at 88-90.

[15] Id. at 91-92.

[16] Id. at 109-115, 119.

[17] Id. at 120-121.

[18] Id. at 122-133.

[19] Id. at 141-143.

[20] Id. at 144-172.

[21] Id. at 42.

[22] Id. at 43.

[23] Id. at 44.

[24] Id. at 45.

[25] Id. at 173-183.

[26] Id. at 19.

[27] Id. at 20.

[28] G.R. No. 169026, June 15, 2006, 490 SCRA 774, 777-778.

[29] G.R. No. 161179, August 7, 2007, 529 SCRA 263, 270-271.

[30] Boncodin v. National Power Corporation Employees Consolidated Union (NECU), G.R. No. 162716, September 27, 2006, 503 SCRA 611, 622-623; Lim v. Court of Appeals, G.R. No. 134617, February 13, 2006, 482 SCRA 326, 331; Tayag v. Lacson, G.R. No. 134971, March 25, 2004, 426 SCRA 282, 299.

[31] G.R. No. 78585, July 5, 1989, 175 SCRA 76, 83.

[32] G.R. No. 155634, August 16, 2004, 436 SCRA 577, 584-586.

[33] Rollo, p. 44.

[34] Id. at 10.

[35] Id. at 27.

[36] G.R. No. 87913, May 6, 1991, 196 SCRA 665, 669.

[37] No. L-25721, May 26, 1969, 28 SCRA 351, 358-359.

[38] Supra note 36, at 672-673.

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[39] G.R. No. 145328, March 23, 2006, 485 SCRA 166, 181.

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