

Pramod Kumar Sahoo Vs. Maguni Sahoo Bidi Merchant and anr.

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SooperKanoon Citation : sooperkanoon.com/531521

Court : Orissa

Decided On : Jan-27-2005

Reported in : 2005(I)OLR396

Judge : A.S. Naidu, J.

Acts : Trademarks Act, 1999 - Sections 135; [Code of Civil Procedure \(CPC\)](#) ,
[1908](#) - Sections 151 - Order 39, Rules 1 and 2

Appeal No. : W.P. (C) No. 11714 of 2004 and F.A.O. No. 385 of 2004

Appellant : Pramod Kumar Sahoo

Respondent : Maguni Sahoo Bidi Merchant and anr.

Advocate for Def. : L. Pangari, Adv.

Advocate for Pet/Ap. : Ganeswar Rath, Adv.

Judgement :

A.S. Naidu, J.

1. In both these cases, i.e. W.P. (C) No. 11714 of 2004 and FAO No. 385 of 2004, the same order dated 16.10.2004 passed by the learned District Judge, Cuttack in CMA No. 132 of 2004 filed under Order 39, Rules 1 and 2 read with Section 151 of the Code of Civil Procedure arising out of Original Suit No. 2 of 2004 is

challenged. The facts and points of law being common in both the causes, both the matters were heard together and are being disposed of by this common Judgment.

2. Bereft of unnecessary details, the short facts necessary for appreciating the inter se disputes between the parties are that in the year 1975 one Maguni Sahoo (since deceased) had started a hand-made 'Bidi* factory at Baideswar in the district of Cuttack in the name and style of 'MAGUNI BIDI'. Arakshita Sahoo, father of Maguni had two sons, namely, Maguni and Krushna Chandra. Krushna Chandra was born deaf and dumb and he died issueless. One Madhusudan Mohapatra and the present Writ Petitioner/Appellant, namely, Pramod Kumar Sahoo, assert to be the adopted sons of late Krushna Chandra.

Maguni died in the year 1997 leaving behind his widow Gande Dei, sons Narasingha Sahoo and Biswanath Sahoo, and a daughter namely Sushila Kumari Dei.

3. The aforesaid Original Suit No. 2 of 2004 was filed by the present opposite parties/respondents as plaintiffs in the Court of the District Judge, Cuttack under Section 135 of the Trademarks Act, 1999. It was asserted in the plaint that there was no partition between Maguni and Krushna Chandra, nor was there any partition among their progenies after their death. Thus the members of the family i.e. the legal heirs and successors of Maguni and Krushna Chandra, continued to be members of a joint Hindu Mitakshara family.

4. By efflux of time, certain dissensions cropped up in the family and an Agreement was executed on 27th December, 2002 inter se between Gande Sahoo, Sushila Kumari Dei, Narasingha, Biswanath, respectively the widow, daughter and two sons of Maguni; and Madhusudan Mohapatra and Pramod Kumar Sahoo, the two sons of Krushna Chandra. The first term in the said Agreement was that 'MAGUNI BIDI' Company would be managed by the parties to the Agreement as they were managing earlier. It was further agreed that Biswanath without establishing a new Bidi business would continue in the management of MAGUNI BIDI Company as he was doing earlier, and all cases initiated against him would be withdrawn. The parties would reveal the accounts of

their business every month before Narasingha, Biswanath, Madhusudan and Pramod and get the same scrutinised and approved. The balance amount after meeting all the expenses would be deposited in a Joint Account in the names of Narasingha and Madhusudan, and the parties to the Agreement might withdraw amounts from that Account as per consent of all, the parties. Last, but not the least, it was agreed that all the parties to the Agreement would have the right, title and interest in the aforesaid joint business.

5. It was alleged that the business 'MAGUNI BIDI' continued smoothly for some time, but then in January, 2000 defendant Pramod started playing hide and seek and started another proprietorship firm in the same name and style of 'MAGUNI BIDI' and manufactured and sold Bidi. Plaintiff Narasingha therefore filed the aforesaid Original Suit before the District Judge, Cuttack with a prayer for declaration that he was the exclusive user of the trademark, label, logos and wrappers for manufacture of 'MAGUNI BIDI' and the defendant be permanently and mandatorily restrained from using the same. Along with the plaint, a petition under Order 39, Rules 1 and 2 read with Section 151 CPC was also filed which was registered as CMA No. 132 of 2004 for grant of an Interim injunction restraining the defendant from manufacturing, selling and passing Bidi in the name of 'MAGUNI BIDI' to market and also for restraining the agents, servants and all other persons acting on behalf of the defendant from using the labels, logos, wrappers and trademark as used by the plaintiff.

6. In the CMA, the defendant filed his written objection taking the stand that the suit being not maintainable, the CMA should be dismissed in limine. The defendant disputed the claim of the plaintiff and stated that after the death of Maguni the plaintiff tried to grab the properties of the defendant and other members of the joint family. The plaintiff violated the terms of the Agreement dated 27.12.2002, thereby compelling the defendant to start another proprietorship firm in the name and style of 'MAGUNI BIDI', It was averred by the defendant that the trademark 'MAGUNI BIDI' was not a registered trademark and, as such, there was no bar in opening another proprietorship firm in the same name and style.

7. The District Judge, after taking into consideration all the facts and circumstances of the case, came to the conclusion that the plaintiff being the prior user of the trademark in question had a prima facie case in his favour and, as such, balance of convenience tilted in his favour. On the basis of such conclusion, the District Judge allowed the CMA and enjoined the defendant restraining him as well as his agents, servants and all the persons acting on his behalf from manufacturing, selling and passing Bidi in the name and style of 'MAGUNI BIDI' to market besides using the labels, wrappers, logos, etc. The said order of the District Judge is assailed in both these cases by the defendant in the suit.

8. Mr. Ganeswar Rath, learned counsel appearing for the defendant who has filed both the Writ Petition and the FAO, forcefully submitted that the District Judge has completely lost sight of the fact that the business of manufacture and sale of 'MAGUNI BIDI' was started by late Maguni Sahoo and the said business was inherited by all the legal heirs and successors of Maguni and Krushna Chandra. Thus the observation that the plaintiff could exclusively carry on the business under the unregistered trade name of 'MAGUNI BIDI' is not only contrary to law, but also thoroughly erroneous and that suffers from the vice of non-consideration of relevant materials on record.

Relying on the decisions reported in AIR 1979 Bombay 302 (Bhikusa v. Jagannath) AIR 1973 SC 2572 (Sohanlal v. Amin Chand & Sons), Mr. Rath forcefully submitted that no injunction could be granted in favour of one of the joint owners restraining others from manufacturing, selling, etc. of goods by using the same trademark. This being the clear position of law, it was submitted, the District Judge acted illegally and with material irregularity in restraining the defendant from carrying on his separate business using the same trademark of the joint family business by holding that the plaintiff was the earlier user of the same.

9. Mr. Rath also submitted that the conclusion arrived at by the District Judge that the plaintiff was the prior user of the trademark is also not correct.

10. Mr. Pangari, learned counsel appearing for the plaintiff in the suit who is opposite party No. 2/respondent No. 2 in the W.P. (C) and F.A.O. respectively, at the other hand, strenuously repudiated the contentions raised by Mr. Rath and

submitted that admittedly since 1997 the plaintiff had been manufacturing and selling 'MAGUNI BIDI' as the sole proprietor of 'MAGUNI SAHOO BIDI MERCHANT'. In the year 2002 the defendant tried to manufacture Bidi separately in the name and style of 'MAGUNI BIDI', but then as the said attempt failed, he abandoned that idea. Thereafter in January, 2004 the defendant again started selling Bidi in the same name and style of 'MAGUNI BIDI' using deceptively similar trademark and using the same labels, logos, wrappers, etc. as used by the plaintiff. Being aggrieved by such action of the defendant, the plaintiff was constrained to file the aforesaid Original Suit before the District Judge.

11. According to Mr. Pangari, the District Judge after taking into consideration voluminous documents filed before him like registration certificate, Central Excise and Sales Tax returns and other documents, was convinced that the plaintiff was the earlier user of the trademark 'MAGUNI BIDI' and therefore rightly restrained the defendant as stated above.

In support of his contention, Mr. Pangari relied upon a number of decisions, viz. AIR 1978 Delhi 250 (Century Traders v. Roshan Lal Duggar & Co.) AIR 1999 Delhi 102 (Senor Laboratories Ltd. v. Jagsopal Pharmaceutical Ltd.) AIR 1987 Orissa 156 (Rajendra Sahoo v. Ganeswar Swain).

12. I have heard learned counsel for the parties at length and perused the materials on record. I am conscious of the fact that the main dispute with regard to user of the trademark 'MAGUNI BIDI' is still subjudice in O.S. No. 2 of 2004 before the District Judge, Cuttack. As such, any observation made at this stage with regard to merit of the suit shall amount to pre-judging the issue. Therefore, exercising self-restraint, I have analysed and considered the arguments advanced by both the sides.

13. The definition of the word 'trademark' says that the same is a mark used or proposed to be used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right either as proprietor or registered user to use the mark with or without any indication of the identity of that person, A trademark is a symbol consisting in general a picture, label, word or words which are applied or attached

to a trader's goods so as to distinguish the same from similar goods of other traders, and to identify the same as those of the manufacturer or his successors in business. The right which a manufacturer has in his trademark is the exclusive right to use it for the purpose of indicating where or by whom or at what manufactory the article to which it is affixed was manufactured. A trademark becomes exclusive property only to a certain extent, i.e. only with reference to the same or similar article of commerce. The trademark is thus used to indicate to the public the origin, manufacture or ownership of the article to which it is affixed and thereby to secure to its owner all benefits from his identification by public with the article bearing it.

14. Considering the dispute at hand in the touch-stone of the general principles laid down in the preceding paragraph, it appears that Maguni had started the Bidi business way back in the year 1975 and he manufactured and marketed Bidi in the name and style of 'MAGUNI BIDI'. Further, admittedly Maguni and his brother Krushna Chandra were members of Joint Hindu Mitakshara Family which was running the business. After the death of Maguni, dissensions cropped up relating to the aforesaid Bidi business and Agreement was executed among the parties on 27.12.2002, all the parties agreeing to run the Maguni Sahoo Bidi Company and the business on 'as is where is' basis and all to take part in the said business as they were doing earlier. It was also specifically spelt out In the said Agreement that an earlier power-of-attorney executed in favour of Narasingha to run the affairs of the Company would stand revoked for the time being.

15. 'MAGUNI BIDI' is an unregistered trademark. On the basis of the aforesaid Agreement dated 27.12.2002 and other materials the plaintiff claims that he should only be permitted to use the said trademark and the defendant who has started manufacturing Bidi by establishing his separate concern with effect from January, 2004 should be restrained from using that trademark. Under these circumstances, the moot question that arises for consideration is whether there was any justification for passing an order of injunction restraining the defendant from using the trademark in question which is an unregistered one. Admittedly the suit, in which the injunction order has been passed, has been filed for declaration that the plaintiff is the exclusive user of the trademark 'MAGUNI BIDI' with a further prayer

for permanent and mandatory injunction against the defendant. Thus the prayer in the suit as well as the prayer in the CMA are identical. Further admittedly the plaintiff and defendant belong to a joint family which was running the Bidi business in the name and style of 'MAGUNI BIDI'. Prima facie it appears that neither party is entitled to exclusive use of the trademark which is used for the Joint family business. But then plaintiff being the L.R. of Maguni and defendant being the L.R. of Krushna Chandra, and they being members of the joint family, both are entitled to a share in the joint family business. That being so, it would not be justified to injunct the defendant restraining him from using the trademark in question. In these circumstances, the proper course to adopt is to permit the status quo to continue as it existed on the date of filing of the suit. The above view taken by me gets fortified from the decision of the Supreme Court in the case of Sohanlal v. Amin Chand (supra).

16. In the result, the impugned order dated 16.10.2004 passed by the District Judge, Cuttack in CMA No. 132 of 2004 is varied to the extent that the defendant in O.S. No. 2 of 2004 will be entitled to use the trademark 'MAGUNI BIDI' till the dispute in question is finally adjudicated and set at rest in the suit. But then, both parties will furnish bi-monthly accounts of all their goods manufactured and sold before the trial Court during pendency of the suit. The District Judge is directed to dispose of the Original Suit as expeditiously as possible, preferably within a period of six months.

With the aforesaid direction/observations the W.P. (C) as well as the FAO are disposed. No costs.