Panjon Ltd. Vs. Swad Industries and Leasing Ltd.

Panjon Ltd. Vs. Swad Industries and Leasing Ltd.

SooperKanoon Citation : sooperkanoon.com/53177

Court : Monopolies and Restrictive Trade Practices Commission MRTPC

Decided On : Aug-24-1993

Reported in : (1994)81CompCas437NULL

Judge : N Gupta, S Ali

Appellant : Panjon Ltd.

Respondent : Swad Industries and Leasing Ltd.

Judgement :

1. This order will dispose of the application under Section 12A of the Monopolies and Restrictive Trade Practices Act, 1969, filed by the complainant against the respondents. The complainant is an established public limited company which is engaged in the manufacture and sale of many items including Panjon tablets, Swad Digestive Drops, Percy Candy and soft drink liquid concentrate. It claims to have purchased the trade mark "Panjon", "Swad" and "Percy" from Panama Chemical Works, Indore, by an agreement of deed of assignment dated May 26, 1990.

Indisputably, the complainant has spent lot of money in advertising for the publicity of the product "Swad" which is by now an established brand. The respondent above-named has been recently incorporated in May, 1992, and is marketing its products particularly packaged tea by name "Swad" associated with it. The label "Swad" of the complainant has been registered under the Copyright Act. Respondent No. 1 started inviting private placement from investors in respect of a public issue to be floated by it.

2. It is alleged that respondent No. 1 intentionally, mischievously and deceptively adopted the name "Swad" in its corporate name and in the name of its products without any authority and in violation of the Copyright Act of "Swad" in favour of the complainant. It is further alleged that respondent No. 2 as the managing director of respondent No. 1, to hoodwink the investing public, highlighted the name "Swad" in its corporate name and attached this prefix to its products. Respondent No. 1 in the meantime floated a public issue and the present complaint has been filed praying for an enquiry against the respondent for adopting unfair trade practice-in terms of Section 36A(1)(i) read with Sub-sections (iv) and (v) of the Act.

3. Along with the complaint, an application for temporary injunction has also been filed wherein it is, inter alia, prayed that the respondents may be restrained from adopting the unfair trade practice by resorting to advertisements connected with the public issue, from collection of subscription and also in any way using the word "Swad" in its corporate name and in its products thereby adversely and irrevocably affecting and harming the interest of the complainant and the consumers in general.

4. Notice of the injunction application was issued to the respondents, vide order dated March 4, 1993. Learned counsel for the respondents appeared on March 23, 1993, and wanted two weeks' time to file a written reply both to the main complaint and the injunction application. The time was granted and the case was listed on April 6, 1993. On the said date, counsel appearing for the respondent wanted further time to file a reply stating that the draft is ready but awaiting signature of the respondent. The time was allowed and the

case was fixed for consideration on April 13, 1993. The respondent was asked to bring accounts of subscriptions made by the public in respect of the public issue of equity on the next date and the respondent counsel agreed to supply the same. The respondent, however, failed to comply with the directions. He was granted one more week's time to file the said statement. However, in view of the respondent's recalcitrant attitude, on April 13, 1993, an interim order was passed directing the respondent "not to utilise the funds received in response to the public issue already floated till further orders". On the next date, i.e., April 27, 1993, learned counsel for the respondent stated that the public issue has not been fully subscribed and that the respondent has written to the underwriters for devolvement. He also gave an undertaking that the company would not utilise the funds received by way of subscription money from the public till the matter is finally decided and devolvement proceedings come to a close. However, the parties were directed not to issue any public notice or other advertisement in the newspapers pertaining to this limited restraint order. It was done on the request made on behalf of the respondent to avoid any possible unintended harm done regarding devolvement proceedings or to jeopardise the proceedings connected with the public issue. By common consent, the matter was fixed for final hearing on the application on July 29, 1993. On the said date, it was brought to the notice of the Commission that the respondent had filed an application under Article 227 of the Constitution in the High Court of Gujarat at Ahmedabad to complain against the order passed by the Commission. This fact of filing a writ petition was not earlier disclosed on behalf of the respondent. In view of the pending proceedings before the High Court, the Commission did not consider it desirable to proceed with the matter. However, learned counsel for the respondent pleaded that the matter may be heard by the Commission because the respondent does not want to pursue the matter before the High Court. The respondent thereafter filed an application before the Commission stating that the petition had been withdrawn and the Commission may hear arguments in the pending application under Section 12A. The arguments were heard quite at length and the arguments concluded on August 19, 1993.

5. Learned counsel for the applicant has mainly contended that the respondent should not be allowed to associate the name "Swad" with its corporate name or in the matter of any advertisement pertaining to its products under the name "Swad" in any form, because it amounts to an unfair trade practice by making unfair use of the name "Swad" established in the market by the complainant after spending huge amounts in popularising it through massive advertisements and such act of the respondent also unfairly misappropriates the goodwill created and estab lished by the applicant over the years. It was further contended that the respondent miserably failed to mobilise money from the public in respect of its public issue and on their own showing only about 10 per cent. of the public issue was subscribed. It is a different matter that by reason of the guidelines issued by the SEBI, the respondent could receive the money from the underwriters to the issue to the extent of a little over 90 per cent. It was, therefore, prayed that the respondents should be directed to refund the amount to the subscribers and not to utilise the same for the purpose of the public issue. The respondents, on the other hand, have contended that the failure of the public issue is because of the general market conditions and the adverse publicity done on behalf of the applicant and that it has nothing to do with the respondent's legal right to utilise the money when, after devolvement, it has actually received more than 90 per cent. of the subscription. In support of this contention, the respondent has also filed the original letter by respondent No. 1 to the Secretary, Baroda Stock Exchange, certifying that the issue having been subscribed to the extent of over 90 per cent., the allotment may be approved. Along with it, a copy of the prospectus was also filed by the respondent with the stock exchange.

There is an endorsement on the said application by the Baroda Stock Exchange "arrangement for allotment approved" duly signed, under the official seal of the said exchange. During the course of arguments, learned counsel for the respondents also drew our attention to the fact that in accordance with the direction given by the District Judge, Dhar, in the civil proceedings, the respondent had issued an advertisement stating that it has no connection with Panjon Ltd. or its product sold under the brand name "Swad". It has also been further contended that the public issue launched by the respondent has not in any way misled or deceived the public by the mere fact that its corporate name is "Swad Industries and Leasing Ltd." or that it sells its packaged tea in the fashion and design of its corporate name "Swad".

6. Learned counsel for the applicant in support of its contentions relied on certain rulings, namely :-- (i) Poddar Tyres Ltd. v. Bedrock Sales Corporation Ltd., AIR 1993 Bom 237.

(ii) Simatul Chemical Industries Pvt. Ltd. v. Cibatul Ltd., AIR 1978 Guj 216.

(iii) K. G. Khosla Compressors Ltd. v. Khosla Extraktions Ltd., AIR 1986 Delhi 181.

(iv) Glaxo Operations U.K. Ltd, v. Samrat Pharmaceuticals, AIR 1984 Delhi 265.

(v) M. P. Ramachandran v. Union of India [1993] 77 Comp Cas 54 (Bom).

7. I am afraid that all these rulings are not directly and fully applicable to the facts of this case. The first case, namely, Poddar Tyres Ltd. v. Bedrock Sales Corporation Ltd., AIR 1993 Bom 237, was a case pertaining to disputes under the Trade and Merchandise Marks Act (43 of 1958), i.e., application for rectification of a registered trade mark. There is no trade mark as yet available in favour of the applicant and as such the ruling is not applicable. So is the case with the ruling of the Gujarat High Court. The third case, K. G. Khosla Compressors Ltd., AIR 1986 Delhi 181, deals with the general considerations applicable to the jurisdiction of a civil court in the matter of granting injunction. There can be no dispute that the general principles enunciated under Order LIX, Rules 1 and 2 of the Code of Civil Procedure are equally applicable to the consideration of such relief under Section 12A of the Monopolies and Restrictive Trade Practices Act, but beyond that the discussion in this case does not help the applicant. That was a case under Section 20 of the Companies Act and it was held therein that a person has no right to get registration of a company in its own name. No doubt there is an observation therein regarding a passing off action which states that such an action does not merely relate to goods but may relate to the name also. It is a well-known case pertaining to wrongful use of the word "Khosla" which was a well known name applicable to the Khosla group of companies and was unauthorisedly and perhaps deceptively misappropriated and misused by the respondent therein. The present is not a case of this nature because the applicant's corporate name is entirely different from the corporate name of the respondent and the mere fact that one of its products is named "Swad" need not necessarily or by direct implication amount to passing off. Further, Glaxo Operations U.K. Ltd. v. Samrat Pharmaceuticals Ltd., AIR 1984 Delhi 265, relates to infringement of a copyright. It deals with sections 51 and 55 of the Copyright Act, 1957, along with certain provisions of the Trade and Merchandise Act, 1958. In the present case, there is no question of any infringement of any trade mark. The applicant has no doubt a copyright in respect of its "Swad" tablets under a certificate of registration from an authority under the Copyright Act. Whether this fact by itself supports the allegation of any misrepresentation or misuse on the part of the respondent so as to amount to an unfair trade practice is a matter which would require proper consideration on the basis of evidence. Barring this aspect, this ruling also may not be applicable directly.

8. Finally, the Bombay High Court in the case of M. P. Ramachandran v.Union of India [1993] 77 Comp Cas 54 has dealt at length with the question of unfair trade practice in regard to a complaint coupled with an interim injunction. In that case, an interim injunction was issued by the Commission in respect of an alleged unfair trade practice resorted to by the respondent. The respondent filed a writ petition before the Bombay High Court challenging the order of the Commission mainly on the ground that the Commission should not have issued the injunction prior to making up its mind as regards institution of a regular enquiry into the matter and, as such, the interim order was without jurisdiction. Rejecting that application, the High Court also went into the powers, functions and dominant role of the Commission in passing appropriate orders as and when the facts of the case so warrant, that is, there is a clear likelihood of some unfair trade practice or restrictive trade practice being indulged in by the respondents. Justice, K. Sukumaran J., speaking for the court, in his detailed judgment, inter alia, observed as under (at page 57) : "The enactment in question is intended to serve a larger public purpose. That is evident from the substantial provisions of the Act, which empower the Commission to enquire into any unfair trade practice. Section 12A projects prominently the aspect of public interest. That section enables the Commission to pass an order when it is proved that any undertaking is carrying on, or is about to carry on, any monopolistic or any restrictive or unfair trade practice and such

restrictive or unfair trade practice is likely to affect prejudicially the public interest or the interest of any consumer or consumers generally. The predominant idea of protecting public interest or the interest of the consumers generally, cannot be overlooked while construing the manner in which that power is exercised. Procedural provisions are duly handmaids to aid the substantial statutory provision." (emphasis supplied) 9. The above observation clearly shows that in the opinion of the High Court the Commission would be within its right to pass an interim injunction if the facts of the case so warrant provided it is satisfied about the existence of essential conditions governing the issue of temporary injunction in terms of Rules 1 and 2 of Order LIX of the Code of Civil Procedure, to ensure that public interest does not suffer by reason of the alleged unfair trade practice, restrictive or monopolistic trade practice of the respondent--overtly or covertly and this power of the Commission is untrammelled by considerations of procedural niceties.

10. On the facts of the present case, we are satisfied that the respondent has fulfilled its obligations to have its issue listed on the concerned stock exchange in terms of its prospectus. The arrangement for allotment has also been approved by the competent authority of the stock exchange. Therefore, there should be no legal impediment against the disbursement of money collected under the public issue in question. We accordingly vacate the restraint order against the respondent which directed it not to utilise the funds received in response to the public issue already floated till further orders. The respondent is free to utilise these funds in accordance with law.

11. The next contention of the applicant pertains to the use of the word "Swad" in the corporate name of respondent No. 1. In this connection, the complainant has relied upon a letter dated May 14, 1992 (annexure "D" to the complaint), issued by the Department of Company Affairs to respondent No. 1 directing it to ensure that the name of the company is suitably changed within 15 days thereof. This letter was issued on the basis of an objection raised by the complainant that this may create confusion in the minds of customers on account of its own product "Swad" having an established trade mark. Respondent No. 1 uses this trade name "Swad" in marketing its packaged tea. It is vehemently argued on behalf of the complainant that "Swad" is an established name in the market as regards ayurvedic sweet tablets manufactured and marketed by the complainant and the two names being identical, the respondent is most likely to mislead and create confusion in the minds of the public about the ownership of this brand name. Avoiding such confusion and misleading effect in the minds of the public is necessary to forestall the prevalence of the impugned unfair trade practice in terms of Section 36A(1) of the Monopolies and Restrictive Trade Practices Act. In this connection, reliance is also placed on the fact that the District Court, Dhar, had directed the respondent to give a public notice that their public issue has nothing to do with the similar name of "Swad" product manufactured and marketed by the complainant. That direction was applicable in regard to the public issue which has now come to a close. There can be little doubt that the use of the name "Swad" as the brand name for the product marketed by the respondent vis-a-vis the established brand name "Swad" in respect of tablets manufactured and marketed by the complainant is most likely to create confusion in the public mind. As to whether adoption of this brand name by the respondent for its products amounts to unfair trade practice or not requires a proper and detailed scrutiny for which enquiry has been ordered under Section 36B(a), read with 36D(1) and 36A(1) of the Monopolies and Restrictive Trade Practices Act. On the lines of the order issued by the District Court, Dhar, we direct the respondent that while making any advertisement, in whatever form, about its product with the name of "Swad", it must give a note therein as boldly as the rest of the advertisement that this product is in no way connected with the product of similar name marketed by "Panjon". The injunction application is accordingly disposed of. Nothing said hereinabove will in any way prejudice the final decision of the enquiry.

12. Notice of enquiry may be drawn up under Section 36B(a), read with Section 36D(1) and 36A(1) of the Monopolies and Restrictive Trade Practices Act, 1969, and a copy thereof be given to learned counsel for the respondents within a week's time who may file its written reply within two weeks thereafter.