

**Bharat Enterprises (India) Vs. C. Lall Gopi Industrial Enterprises**

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**Court :** Punjab and Haryana

**Decided On :** Mar-31-1999

**Reported in :** AIR1999P& H231; (1999)122PLR121

**Judge :** V.S. Aggarwal, J.

**Appeal No. :** First Appeal from Order No. 145 of 1999

**Appellant :** Bharat Enterprises (India)

**Respondent :** C. Lall Gopi Industrial Enterprises

**Advocate for Def. :** Sh. Ashok Aggarwal, Sr. Adv. and; Sh. Hemant Kumar, Adv.

**Advocate for Pet/Ap. :** Sh. Puneet Bali, Adv.

**Judgement :**

**V.S. Aggarwal, J.**

1. The present appeal has been filed by M/s. Bharat Enterprises (India), hereinafter described as 'the appellants' directed against the interim order passed by the learned Additional District Judge, Sonapat, dated 25-1-1999. By virtue of the impugned order, the learned trial Court had allowed the application of the respondent-plaintiffs (M/s. C. Lall Gopi Industrial Enterprises and Miss Reema Gupta). The appellants were restrained from using the trade mark 'HEAT PILLAR' for selling their room heater with the same design, shape, mark etc. The

respondents were directed to file a bond within a week in the sum of Rs. 1 lac to the satisfaction of the trial Court and in the event of failing the respondents were to compensate the appellants for the loss ensued due to the order of injunction.

2. Some of the relevant facts can conveniently be delineated.

3. The case of the respondents in that the firm M/s. C. Lall Gopi Industrial Enterprises was established in the year 1993. It is manufacturing Heat Pillars under the name and style of their trade mark 'HEAT PILLAR'. The respondents had designed it and started manufacturing the same. It soon acquired great reputation in the country and even abroad. An application even was filed with the Registrar of Trade Marks in August, 1994. Under the trade mark 'HEAT PILLAR' as a room heater it is well known to be the product of the respondents. Originally, the sister concern of the respondent M/s. C. Lall Electrical and Mechanical had applied for registration of trade mark 'PILLAR. Later on, all the rights and interest were transferred to respondent No. 1.

4. The grievance of the respondents was that the appellants without any infrastructure of their own started using the goodwill any reputation of the respondents. They have started misrepresenting their products as products of the respondents. They have produced heaters in the name and style of 'Belco Heat Pillar' with similar design and shape and packing material. It is deceptive. The expression 'Heat Pillars' being used causes confusion to the public and loss to the respondents. It was prayed that in the action for passing off the appellants should be restrained from using the name 'HEAT PILLAR' as a trade mark or to sell the same under the same design, shape or mark.

5. The claim of the respondents was contested by the appellants. It was alleged that the suit of the respondents is not maintainable. The term 'Heat Pillar' is a descriptive/generic word. It is used in respect of the room heater which is in pillar type shape. The room heater which is in a pillar type shape is commonly called Heat Pillar by various manufacturers. Even tenders issued by various government agencies had called it a Heat Pillar. Copies of some tenders of Controller of Stores, Himachal Pradesh dated 2-12-1998 were produced. It was denied that the respondents had any cause in this regard.

6. The learned trial Court went into the controversy and formulated a prima facie view. It was held that the design is basically identical. The name Belco Heat Pillar and Gopi Heat Pillar can mislead the customer. The respondents have been using the word Gopi Heat Pillar before the appellants and accordingly it was concluded that the respondents have a prima facie case. Accordingly, ad interim injunction already referred to above was granted.

Aggrieved by the same, present appeal has been filed.

7. The argument of the appellants' learned counsel mainly proceeded on the premise that the word Heat Pillar is descriptive. It does not mislead any person. In fact, the material words used by the appellants are 'Belco Heat Pillar' while the respondents use 'Gopi Heat Pillar'. The customer would purchase other the Heat Pillar of Belco or Gopi make. Needless to emphasize that the learned counsel for the respondents has controverted the same.

The test whether words are descriptive has been laid down in *Corpus Juris Secundum*, Vol. 87 in paras 34 and 35, at page 271, as follows :

'The true test in determining whether a particular name or phrase is descriptive is whether, as it is commonly used, it is reasonably indicative and descriptive of the thing intended. In order to be descriptive within the condemnation of the rule, it is sufficient if information is afforded as to the general nature or character of the article and it is not necessary that the words or marks used shall comprise a clear, complete and accurate description. The meaning which should be given is the impression and significance which are conveyed to the public. Whether words or marks claimed as trade marks are descriptive or whether they are suggestive or arbitrary and fanciful must be decided with respect to the articles to which they are applied and the mark must be considered as a whole.'

An exclusive trade mark must consist of some arbitrary or fanciful term, figure, or device, and words or phrases, in order to constitute a trade mark, must be used in a purely arbitrary or fanciful when they do not, by their usual and ordinary meaning, denote or describe products to which they are applied, but rather came to indicate their purposes by application and association.'

8. In other words, the principle or settled rule would be that either in the case of goods or business the plaintiff has to show that his mark has become so distinctive that the public regard the same as belonging to a particular source. The plaintiff has to further prove that the offending mark or name is likely or calculated to deceive and cause confusion among the public thereby injuring the plaintiff's business. The test in this regard necessarily would be of a normal prudent person as to whether the appellant is selling the goods so marked as by design or calculated the public to believe that they are the goods of the respondent. The Supreme Court in the case of *Amritdhara Pharmacy v. Satya Deo Gupta* (AIR 1963 SC 449), has held that to man of average intelligence the overall structural and phonetic similarity of two names 'Amritdhara' and 'Lakshmandhara' was likely to deceive or cause confusion. Similarly, in the case of *K. R. Chinna Krishna Chettiar v. Sri Ambal and Company and another* (AIR 1970 SC 146), it was held that there was a striking similarity and affinity of sound between the words 'Ambal' and 'Andal'. It could cause real danger and confusion between the two marks. It is abundantly clear from the aforesaid that the Act does not lay down any criteria for determining what is likely to deceive or cause confusion. Every case must depend upon its own peculiar facts and value of the validity lies in not actual decision in determining what is likely to deceive or cause confusion.

9. Strong reliance on behalf of the respondents was placed on the decision of the Madras High Court in the case of *Indian Dental Works by its Proprietor Dhanalakshmi Ammal and another v. K. Dhanakoti Naidu and another* (AIR 1962 Madras 127), wherein it was concluded that in a suit for an action for passing off, the resemblance between the two trade marks have to be taken care of. It is for the court to assess the value of the contention that the public is likely to be misled by the two trade marks. In paragraph 16 of the judgments, it was held as under :

'..... But even without such evidence it is for me to assess the value of the contention that the public are likely to be misled by the two trade marks and they resemble each other very closely both in get-up in the colour scheme adopted, and, in the descriptive matter and above all in the picture of the human face and the numeral 1431. These are, in my opinion, sufficient to show that the first defendant consciously adopted his trade mark with the idea of pirating the trade

mark of the plaintiffs.'

10. Reliance further was placed on the Division Bench decision of this Court in the case of *The General Electric Co. of India (P) Ltd. v. Pyare Singh and others* (AIR 1974 P&H; 14). The General Electric Co. (for short 'G.E.C.') had brought a civil suit against the respondent who is selling certain goods under the name of A.E.C. lamp-holders. The question in controversy, as in the present case, was as to if there was similarity in this regard or not. It was held that a purchase of ordinary intelligence was bound to confuse because of the similar words being used in the sale of G.E.C. and A.E.C. In another decision of this court in the case of *Ranjit Singh v. Jaswant Singh* (AIR 1975 P&H; 121), this Court took note of similarity of words and held as under :

'..... It is well settled law that where the name of one particular individual or firm has gained universal reputation in connection with a particular class of goods and a second person enters the trade under a name which is the same or similar and which is likely to cause confusion in the minds of the intending purchasers and the harm thus caused is prima facie such as no compensation would be enough to counter-balance it, Court can restrain that person from trading under a name which is similar by granting injunction; vide *Ishar Das v. Bhaion Ki Dokan* (AIR 1940 Lah. 39).'

Same principles were reiterated by a Division Bench of Delhi High Court in the case of *Century Traders v. Roshan Lal Duggar & Co. and others* (AIR 1978 Delhi 250). In paragraph 14 of the judgment, it was held as under :

'Thus, the law is pretty well settled that in order to succeed at this stage the appellant had to establish user of the aforesaid mark prior in point of time than the impugned user by the respondents. The registration of the said mark or similar mark prior in point of time to user by the appellant is irrelevant in an action for passing off and the mere presence of the mark in the register maintained by the trade mark registry did not prove its user by the persons in whose names the mark was registered and was irrelevant for the purposes of deciding the application for interim injunction unless evidence had been led or was available of user of the registered trade marks. In our opinion, these clear rules of law were not kept in

view by the learned Single Judge and led him to commit an error.'

11. The attention of the Court was also drawn to the decision of the Calcutta High Court in the case of Allergen Inc. v. Milment Of the Industries and others (AIR 1998 Cal. 261 = 1998 (Suppl.) Arb. LR 132), wherein it was held that a plaintiff with a reputation which is established internationally can sue to protect it in India even if it did not have any business activity in the country. The other person could be restrained from using similar names.

12. Indeed, these decisions will not come to the rescue of the respondents. As already pointed out above and rementioned at the risk of repetition that one has firstly to see whether phonetically the words are similarly used and whether it could mislead a common person or not. The leading case on the subject available is the decision of the Supreme Court in the case of J. R. Kapoor v. Micronix India (1994 Suppl. (3) SCC 215). In respect of certain electrical and electronic apparatus the trade marks used were Microtel and Mirconix. In a suit filed under the Trade and Merchandise Act, 1958, a similar question cropped up. The appellant before the Supreme Court was one of the partners of M/s. Micronix India. Another business was started under the name and style of M/s. Microtelmatrix with the trade name Microtel. The Supreme Court held that the word Micro was descriptive and otherwise it does not mislead the other person. The findings of the Supreme Court are as under :

'..... Further, the word 'micro' being descriptive of the micro technology used for production of many electronic goods which daily come to the market, no one can claim monopoly over the use of the said word. Anyone producing any product with the use of micro-chip technology would be justified in using the said word as a prefix to his trade name. What is further, those who are familiar with the use of electronic goods know fully well and are not likely to be misguided or confused merely by, the prefix 'micro' in the trade name. Once, therefore, it is held that the word 'micro' is a common or general name descriptive of the products which are sold or of the technology by which the products are manufactured, and the user of such products are, therefore, not likely to be misguided or confused by the said word, the only question which had to be prima facie at this stage if whether the

words 'tel' and 'nix' in the trade names of the appellant and the respondent are deceptive for the buyers and users and are likely to misguide or confuse them in purchasing one for the other. According to us, phonetically the words being totally dissimilar are not going to create any such confusion in the mind of the user .....

13. Similarly, Madras High Court in the case of Parle Products Limited v. Bakemans Industries Limited (1998 PTC 662 = 1998(1) Arb. LR 583), was concerned with the same question. In the cited case, the applicant was a registered proprietor of the trade mark GLUCO. The respondent was selling biscuits under the mark GLUCO GOLD. Madras High Court considered this controversy and held that the packets were different and the products were also not similar. It is not likely to mislead an ordinary person. Merely because GLUCO word was common was not enough for the grant of ad interim relief.

14. This court in the case of Punjab State Co-operative Supply and Marketing Federation Ltd. v. Sona Spices Pvt. Ltd. (1987 PTC 294), in an action for passing off dealt with the situation whether trade mark 'Sohna' and 'Sona Spices' were being used. Ad interim injunction so claimed was refused. The answer given was of their being no similarity to deceive an ordinary customer.

15. Reference with advantage can well be made to the decision of the Madras High Court in the case of Indo-Pharma Pharmaceutical Works Ltd., Mumbai v. Citadel Fine Pharmaceuticals Ltd. Madras (1998 PTC 775). In the cited case, the appellant had filed a suit for permanent injunction to restrain the respondent from infringing its registered trade mark 'ENERJASE'. The other company was using the name of 'ENERJEX'. The Court held that no person can claim exclusive right of descriptive name. Delhi High Court in the decision rendered in the case of Rupee Gains Tele-Times Private Ltd. v. Rupee Times (1995 PTC 384), also found that the word 'RUPEE' is not distinctive word. It is connected with trade and business.

16. What is the position herein On behalf of the respondents, two sealed packets were produced to show that they were similar. But the name of Belco was distinctively inscribed on the appellants packet, while on that of respondents. Gopi before Heat Pillar could be noticed distinctively. It could not deceive a person as to

whether he is purchasing the Heat Pillar of Gopi or Belco make.

17. The expression 'HEAT PILLAR' must be taken to be a generic work. All those room heaters which are so designed like a pillar are using the word Heat Pillar. It cannot be confined to the respondents. They cannot have the exclusive right to use the word Head Pillar. It is the other words of the company concerned which are the tilting factors. In the case of appellants they are using the word 'Belco'. Between the word 'Belco' and 'Gopi' there is a clear phonetic distinction.

18. The attention of the court even had been drawn to the advertisement of the Himachal Government wherein it is also using the word Head Pillar. The same is not being confined to only the respondents. It show that the Himachal Government even wanted Heat Pillar from different companies having different names, may be that they will use the name Heat Pillar. Different logos have been used and slight similarity in packets by itself cannot be a factor to prompt the court to hold that an ordinary person would be deceived. Therefore, the order passed by the learned trial Court cannot be sustained.

For these reasons, the appeal is allowed and the impugned order is set aside, besides the application seeking ad interim injunction is dismissed.

19. Appeal allowed.

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