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**Court :** Punjab and Haryana

**Decided On :** Sep-28-1979

**Reported in :** AIR1980P& H127

**Judge :** Harbans Lal, J.

**Acts :** Trade and Merchandise Marks Act - Sections 28, 30, 105 and 106; Copyright Act; Designs Act

**Appeal No. :** F.A.F.O. No. 50 of 1979

**Appellant :** Vikas Manufacturing Company

**Respondent :** Bharaj Manufacturing Company (Regd.) and anr.

**Judgement :**

1. The respondent, M/s. Bharaj Manufacturing Co., filed a snit for infringement and passing off, under Sections 105 and 106 of the Trade and Merchandise Marks Act, (hereinafter called the Marks Act), the Copyright Act, and the Designs Act, to restrain the present appellant from infringing his trade mark, BEMCO and from using the trade mark VEMCO or any other mark, deceptively similar to BEMCO in manufacturing locks, from infringing this registered design of the locks as well as from infringing the registered label on the carton under the Copyright Act, in the Court of the District' Judge, Jullundur. During the pendency of this suit, an

application was filed under O. XXXIX Rr. 1 and 2, read with Section 151 of Civil P. C., for the issuance of an interim injunction. This application was allowed by the order of the Additional District Judge, Jullundur, vide his order dated January 10, 1979, and the present appellant was restrained from using the trade mark VEMCO or any other deceptively similar trade mark of BEMCO of the respondent, in the manufacture of locks. The appellant was also restrained from using the registered design of the respondent as well as from using the carton with the label similar to that of the respondent which was registered under the Copyright Act, till the decision of the suit. The present appeal is directed against the said order. The application had been filed on November 24, 1978, which was fixed for December 7, 1978, for the appearance of the appellant. He had been served along with a copy of the application on November 29, 1978. As the presiding officer was on leave on December 7, 1978, the application was taken up the next day when the appellant was ordered to file the reply on or before December 23, 1978. As the reply was not filed on the said date, the case was again adjourned to January 8, 1979, and the appellant was burdened with Rs. 15/- as costs. Instead of filing the reply, the appellant submitted an application on January 8, 1979, under Section 30 read with O. XI R. 14 and Section 151 of Civil P. C., for direction to the respondent to file the original certificate of registration of the trade mark in his favour. That application was dismissed. It is also not disputed that the appellant neither filed the reply to the application of the respondent for interim injunction, nor the written statement in the main suit. It was in these circumstances; that the impugned order was passed on January 10, 1979.

2. It is the admitted case of the parties that the trade mark BEMCO of the respondent in respect of manufacture and sale of locks was registered by the Registrar under the Marks Act in 1972. The label with the words 'BEMCO KAMAL TAL' which is used on the cartons by the respondent and the design of the locks are also 'registered under the Copyright Act and the Designs Act. On the other hand, the trade mark VEMCO, as used by the appellant, and the design of the lock are not yet registered under the Marks Act and the Designs Act. Only the label, as used on the cartons by the appellant was registered under the Copyright Act on September 18, 1978. At the time of the arguments, it was also pointed out by the learned counsel for the respondent, that the application of the appellant, for the

registration of the design of the locks had also been dismissed in May, 1979 and the application filed by the respondent for the cancellation of the appellants copyright regarding label (the carton) had not been decided by the Registrar under the Copyright Act so far, as no reply has been filed by the appellant.

3. According to the averments in the application for interim injunction the respondent is a renowned manufacturer of locks and is manufacturing and selling the locks under the trade mark BEMCO since 1972. His trade mark in respect of the padlocks was registered under the Marks Act on February 12, 1973. His label 'BEMCO KAMAL TAL' used on cartons for packing of the locks for registered under the Copyright Act and so was the design of the lock under the Designs Act, On account of the large and extensive scale of the locks manufactured by the respondent under the registered trade mark, design and label this registered mark had become popular and acquired a distinctive character in the eyes of the public. It was also averred that the buyers of the locks manufactured by the respondent include the persons unacquainted or imperfectly acquainted with English alphabet and they identify the locks manufactured by the respondent by appearance of the aforesaid trade mark, design and the colour scheme. The respondent came to know on November 23, 1978, that the appellant was manufacturing, selling and offering for sale his locks under the trade mark VEMCO under the same design and label which was deceptively similar to the trade mark design and label of the locks manufactured and sold by the respondent and thus causing confusion in the public mind. In these circumstances, according to the respondent, he was suffering a huge loss in his business and there was a prima facie case for the issuance of an interim injunction during the pendency of the suit. All these averments were supported by affidavit by Bachittar Singh, one of the partners of the respondent. As referred to above, no reply was filed on behalf of the appellant and thus, there was no alternative for the Additional District judge but to proceed on the assumption that the averment made by the respondent in his petition and in the affidavit were correct, The Additional District Judge before issuing the interim injunction also closely Perused the trade mark, the design and the label on the cartons as used by the respondent for the manufacture of the locks as well as the trade mark, the label and the design used by the appellant in the manufacture of hie locks, and came to the conclusion that there was a prima facie case in favour

of the respondent.

4. According to the learned counsel for the appellant, the trade mark registered in favour of the respondent was not confined only to the letters BEMCO but also comprised of these letters as well as the pictorial diagram on which those letters were affixed as is clear from the certificate of registration, but the respondent was not specifically using this registered trade mark in the manufacture of his locks or the label on the carton, but only the letters BEMCO were used. On these premises, it was argued that the appellant could not be held guilty of infringement of this trade mark. So far as the registration of the label under the Copyright Act was concerned, it was pointed out that the appellant has also got his label registered under the Copyright Act on Sept, 16, 1978. His application for registration of the design of the lock had been filed on August 14, 1978, before the Registrar under the Designs Act, but has not been finally disposed of. It was also stressed that a variety of locks under similar trade marks like MEMCO; EMCO were being manufactured by other manufacturers for a very long time and the respondent has not taken any steps for restraining the manufacture of the same, Reliance was also placed on *D. Adinarayana Setty v. Brooke Bond Tea of India Ltd* AIR 1960 Mysore 142, *A. R. Gangadhara and Co. v, Firm of Police Mallaih Rajeswar & Co'* AIR 1962 Andh Pra 510, *Firm Gaylord v. Kwality Restaurant*, 1982 Cur LJ 517 (Punj), *Durga Dutt Sharma v. Navaratna Pharmaceutical Laboratories*, AIR 1965 SC 980, and ~ Division Bench judgment of this Court in F. A. O. No. 35, of 1978 (*Panipat Co-operative Sugar Mills Ltd, v. Mahan Meakin Breweries Ltd.*), decided in March 15, 1978.

5. Section 28 of the Marks Act confers an exclusive right to the use of the trade mark on its registered proprietor in relation to the goods in respect of which the trade mark is registered, If where is any infringement of any trade mark by any person, the registered proprietor is entitled to the relief as provided under the other provisions of the Marks Act. Under Section 29, the ambit and scope of the infringement of this trade mark is laid down, It has been provided specifically that if a person who does not have the trade mark registered in his name, uses in the course of his trade, a mark which is identical with or deceptively similar to the trade mark which is registered in the name of another person, in such a manner

that the intending purchasers may be deceived so as to mistake this mark for the registered trade mark, he infringes a registered trade mark. In *K. R. Chinna Krishna Chettiar v. Sri Ambal and Co.*, AIR 1970 SC 146, it was held that when the trade mark of snuff 'Ambal' is registered, another dealer also dealing in snuffs cannot be allowed to get the trade mark with the words 'Andal' registered as there is a striking similarity and affinity of sound between the words 'Ambal' and 'Andal'. Regarding the resemblance between the two trade marks, it was held,--

'There resemblance between the two marks must' be considered with reference to the ear as well as the eye and ocular comparison is not always the decisive test. Therefore, even if there be no visual resemblance between the two marks, that does not matter when there is a close affinity of sound between the words which are distinctive features of the two marks.'

6. The argument that if distinctive words are used in both the trade marks which have a distinctive meaning and, therefore phonetic resemblance cannot be held to cause confusion, was also repelled in the following words:--

'Merely because the distinctive words used in both the marks have distinctive meanings, it cannot be said that the phonetic resemblance does not lead to confusion, when it is likely that majority of the customers are not capable of understanding the fine distinction between the meanings of the two words,' The ratio of the decision in *Durga Dutt Sharma's case* (supra), relied upon by the learned counsel for the appellant regarding the infringement of registered trade mark is also on similar lines and does not in any manner assist the case of the appellant, In the said case, it was held,--

'Where the two marks are identical no further questions arise; for then the infringement is made out. When the two marks are not identical, the plaintiffs would have to establish that the mark used by the defendant so nearly resembles the plaintiff's registered trade mark as is likely to deceive or cause confusion and in relation to goods in respect of which it is registered. Where the question arises an action for infringement the onus would be on the plaintiff to establish that the trade mark used by the defendant' in the course of trade in the goods in respect of which his mark is registered is deceptively similar. This has necessarily to be ascertained

by a comparison of the two marks--the degree of resemblance which is necessary to exist to cause deception not being capable of definition by laying down objective standards. The persons who would be deceived here, of course, the purchasers of the goods and it is the likelihood of their being deceived that is the subject of consideration. The resemblance may be Phonetic visual or in the basic idea represented by the plaintiff's mark. The purpose of the comparison is for determining whether the essential features of the plaintiff's trade mark are to be found in that used by the defendant. The identification of the essential features of the mark is in essence a question of fact and depends on the Judgment of the court based on the evidence led. before it as regards the usage of the trade It should, however. be borne in mind that the object of the enquiry in ultimate analysis is whether the mark used by the defendant as a whole is deceptively similar to that of the registered mark of the plaintiff.'

'The learned counsel also made an attempt to build an argument with reference to Section 30, Marks Act. and urged that under the said provision if the trade marks of two persons have been registered under the Marks Act, which are identical or nearly resemble each other, the use of the same does not amount to infringement' of any of the trade marks. However, in the present case. there is no such position, as no trade mark, whether identical or similar to the trade mark of the respondent has, as yet been registered in the name of the appellant. The mere fact that his petition or registration of the trade mark is pending before the Registrar under the Marks Act cannot be pressed into service for any purpose.

7. According to the learned counsel for the appellant, the appellant has been using the trade mark, in question, the label and the design of the locks, for a very long time before the filing of the petition by the respondent and, therefore, on account of the concurrent user of the same, the respondent is not entitled to any order of injunction. Support was sought from the decision in D. Adinarayna Setty's case (supra). In the said case, it was only held that a plea of honest and the concurrent user in an action for an infringement really. connotes that the defendant,, on the basis of this plea, is entitled to get' his mark also registered under the provisions of law and it was only upon the registration that this plea became complete and absolute and not before.

8. In Firm Gaylord's case (supra), interim injunction allowed by the trial court' was set aside and the defendant was put to terms, but one of the important considerations for this conclusion was that it was concluded that the defendant had already carried on his business for about ten months before the filing of the petition for interim injunction, and the Court came to the conclusion that in view of the circumstances, the balance of convenience was not in stopping the business of the defendant during the pendency of the suit, but in putting him to terms. In the present case, as the appellant did not file any reply or any affidavit to show as to for how long he has been carrying on his business, there is no material for this consideration to have a bearing on the validity of the order.

9. In A. R. Gangadhara's case (supra), it was held that in case any proceedings for rectification of the register in relation to the trade mark already registered are pending in the High Court, the Court can pass any appropriate order regarding injunction while staying the proceedings in the suit. A perusal of this judgment clearly shows that nowhere it was said that' injunction order on the terms as passed in the present case, could not be passed.

10. In the Panipat Co-operative Sugar Mills' case (supra), the Division Bench upheld in appeal, the order of interim injunction passed by the Additional District Judge, and it was held that on facts, the element of passing off, by sellers of whisky under the label of MB as against the label of the plaintiffs, MMB, could not be ruled out.

11. I have also carefully Perused the registered trade mark BEMCO, the registered label on the carton and the design of the lock of the respondent as registered and compared the same with the trade mark VEMCO, label end design of the appellant and have not been label to persuade myself to differ with the conclusion of the trial court that prima facie case for the issuance of an interim injunction was made out. The suit was filed on November 24, 1978. The petition for interim injunction was also filed on the same day and according to the averments of the respondent in paragraph 9 of the petition, only one day earlier he had come to know that the appellant' was manufacturing and selling the locks under the trade mark, in question. There being no reply or counter-affidavit, there was no material on the

record to sustain the contention of the learned counsel for the appellant that the appellant had been manufacturing and selling the locks with the trade mark, in dispute, for quite a long time and as such there was any balance of convenience in his favour.

12. For the reasons mentioned above there is no merit in the appeal and the case is dismissed with costs.

13. Appeal dismissed.

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