Vikas Manufacturing Co. Vs. Bharat Manufacturing Co.

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Court : Delhi

Decided On : Sep-28-1979

Reported in : 17(1980)DLT30

Judge : Harbans Lal, J.

Acts : Trade and Merchandise Marks Act, 1958 - Sections 28; Code of Civil Procedure (CPC), 1908 - Order 39, Rule 1

Appeal No. : First Appeal No. 50 of 1979

Appellant : Vikas Manufacturing Co.

Respondent : Bharat Manufacturing Co.

Advocate for Pet/Ap. : I.K. Mehta,; S.P. Jain and; S.C. Chadha, Advs

Judgement :

Harbans Lal, J.

(1) Respondent is manufacturing locks under trade name Bemco and got this mark registered under Trade & Merchandise Marks Act in 1972 and also got label with words 'BEMCO Kamal TAL' registered under copyright and design Acts. Alleging that be noticed on 23.11.78, that appellant was infringing his trade mark by using a deceptively similar trade mark (VEMCO), he sued him on 24.11.78 and also filed an application for interim injunction. The defendant did not file any reply to this

application and Addl. Distt Judge granted interim injunction. Appellant appealed to High Court claiming that he was using his mark of Vemco since long and also that the label used by him on his cartons was registered on 16.9.78. and that he had applied for registration of his trade mark. The respondent contended that appellant's application for registration had been dismissed in May, 1979 and cancellation of his registration of label (of 16.9.78) was pending. Appellant stressed that plaintiff's registration consisted of letters Bemco on a pictorial diagram and as plaintiff was not using this diagram, he was not guilty of infringement. He relied on D. A. Sethy v. Brook Bond Tea Air, 1960 Mys. 142, A.R. Gangadhar & Co. vs. Firm P.M. Rajeshwar & Co. Air 1962, A.P. 510, Gaylordvs. Kwality Restaurant 1962, CLJ. 517, Kvj Pt. Durga Dut v. Navratna Phar Lab. : [1965]1SCR737 , Panipat Coop. Sugar Mill vs. Mohan Meakin Brewaries Fao 35/78, D/15.3.78.

(2) 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 there 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 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 Chettar v. Sri Ambal & Co. : [1970]1SCR290 , it was held that when the trade mark of snuff 'Ambal' is registered, another dealer also dealing in snuff 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 :

'THEresemblance between the two marks must be considered with reference to the ear as well as the eye and occular comparison is not always the decisive test. thereforee, even if there bs 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. 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 meaning of the two words.'

(3) The ratio of the decision in Pt. Durga Datt Sharma case (Supra,) relied upon by the learned counsel for the appellant regarding the infrigement 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 :

'WHEREthe two marks are identical no further questions arise, for then the infringement is made out. When the two marks are not identical, the plaintiff 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 in 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 person who would be deceived are, 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 to be found in that used by the defendant. The identification of the essential features of the marks is in essence a question of fact and depends on the evidence 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.'

(4) 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 thereforee, 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. Adinarayana Settya'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.

(5) In 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 this circumstance, 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 bow 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.

(6) 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 order during 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.

(7) In The Panipat Co-op. Sugar Mill's 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 elements of passing off, by sellers of whisky under the label of Mmb as against the lebal of the plaintiff's Mmb, could not be ruled out. 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 and design of the appellant and have not been able to persuade myself to differ with the conclusion of the Trail Court that a 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 injuction 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 favor.