

Mohan Kumar Vs. Narendra Products

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Court : Delhi

Decided On : Nov-02-1993

Reported in : 1993IVAD(Delhi)585; 1993(27)DRJ553

Judge : J.K. Mehra, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 39, Rule 1

Appeal No. : Interim Application No. 3752 of 1992 and Suit No. 811 of 1993

Appellant : Mohan Kumar

Respondent : Narendra Products

Advocate for Pet/Ap. : K.G. Bansal and; Mohan Vidhani, Advs

Judgement :

J.K. Mehra, J.

(1) This is a suit filed by the plaintiff against the defendant for alleged passing off by the defendant of its goods as those of the plaintiff by adopting the trade mark Shankar with a pre-fix 'Sarvpriya'. The prefix appears in very small letters. The plaintiff is alleged to have adopted the trade mark Shankar with a pre-fix 'Jai Shiv' appearing in very small letters. Thus predominant mark which is most prominent on the container of the product in both the cases, is 'SHANKAR' in both the cases. The product being marketed is Scented Supari (Betal nut power) and Pan Masala.

(2) Notice of the suit was served on the defendant and the defendant filed the written statement and reply to the application for interim injunction taking up the plea that they in fact are the prior user of the alleged offending mark and the plaintiffs have copied the trade mark Shankar as well as colour scheme of their pouches for Pan Masala. The defendants have not given any sales figures for their products.

(3) Defendants have also challenged the plea of lack of territorial jurisdiction of this court to entertain and try the present suit.

(4) Thus each party has alleged prior adoption of the mark.

(5) According to the plaintiff the sales figure till the date of filing of the suit of their pouches containing scented supari were only of Rs.45,000.00 which by no means can be considered to be substantial. Furthermore, the plaintiffs have their place of business in Dholpur while the defendants are marketing their product at Agra in U.P. It is also on record that the defendants had also instituted a suit against the plaintiffs for their alleged violation of their trade mark rights and had obtained an exparte injunction against the plaintiffs which order was got stayed by the plaintiffs in appeal to the High Court of Judicature at Allahabad.

(6) It is not clear whether the plaintiff had filed any written statement or had raised any counter claim in the suit of the defendants instituted at Agra.

(7) According to the plaintiffs trade mark 'Jai Shiv Shankar' in respect of scented supari (betel nut powder) was adopted on 13th April 1992 and has been continuously used by the plaintiffs. It is further pointed out that the plaintiff obtained an approval of the Central Excise Department, Rajasthan, in February 1993 regarding the use of its label with the aforesaid trade mark. The plaintiff had also filed an application for registration of the trade mark being application No.591215 for scented supari and Pan Masala. The plaintiff has filed copies of the newspaper to show that the mark of the plaintiff is being advertised and they are taking active steps to popularise their trade mark. The plaintiff on coming across the trade mark of the defendant again noticed in a local newspaper dated 1.4.93 got inserted by the defendants initiated the present action.

(8) According to the allegations in the written statement defendants had adopted the trade mark Shankar in the year 1992. However, the date of adoption has not been mentioned by the defendants.

(9) The defendants have also filed an application for registration of the trade mark bearing No.591788 dated 1.3.93- From the Serial numbers it appears that the application of the defendants was filed subsequent to the application of the plaintiff. The plaintiff has alleged that he is marketing its products in Rajasthan, U.P. and Union Territory of Delhi.

(10) In order to judge whether the goods of one are likely to be passed off as goods of the other, the court has to examine all the surrounding circumstances as well as the two competition marks to ascertain the likely effect that the two marks are likely to have on the mind of unwary purchaser. It is cardinal principle of healthy trade that the competition must remain free, yet it is essential that the trading must not only be honest but must not even unintentionally be unfair. A line must be drawn somewhere between the honest and dishonest trading and between fair and unfair competition.

(11) From the averments of both the parties it prima facie appears that the trade Jai shiv Shankar was adopted by the plaintiff prior in time and that the product in the pouches carrying the said trade mark have been sold by the plaintiff in three States further gives rise to an impression that the defendant could not have been unaware of the mark of the plaintiff and also the colour scheme and general get-up which is deceptively similar to that of the plaintiff. But neither party has established considerable sales or actual instances of deception. It is for this reason that at this stage, I am not inclined to pass an interim order of injunction but I consider it to be in the interest of justice to give certain directions. Accordingly I direct that the defendant shall not market its products outside Agra Division till further orders and that the Defendant shall file in this court every quarter a statement of account showing the sales affected by it during the pendency of the suit. Liberty to parties to seek further directions.

(12) I.A. stands disposed of in the above terms. Suit No.811/93

(13) In view of the preliminary objection of the defendant raised in the written statement, I frame the following preliminary issue:-

'WHETHER this Court has the territorial jurisdiction to entertain and try the present suit?'

(14) Parties should file their respective documents and the affidavits by way of evidence if any on this issue within 3 weeks. Deponents should appear in the court for being tendered for cross-examination if required by the opposite party.

(15) List the suit for hearing arguments on the above preliminary issue on 7th December 1993.

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