

Kewal Krishan Kumar Vs. Kaushal Roller Flour Mills Pvt. Ltd.

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Court : Delhi

Decided On : Aug-23-1996

Reported in : 1996(39)DRJ168

Judge : M.K. Sharma, J.

Acts : [Trade and Merchandise Marks Act, 1958](#); [Code of Civil Procedure \(CPC\), 1908](#) - Order 39, Rule 1

Appeal No. : Interim Application No. 4066 of 1992 and Suit No. 1621 of 1992

Appellant : Kewal Krishan Kumar

Respondent : Kaushal Roller Flour Mills Pvt. Ltd.

Advocate for Pet/Ap. : M.K. Miglani and; R.N. Prabhakar, Advs

Judgement :

M.K. Sharma, J.

(1) The plaintiff has instituted a suit for perpetual injunction restraining infringement of trade mark, passing off and rendition of accounts in respect of the trade mark of the plaintiff 'SHAKTI BHOG'. The main relief sought for in the suit is for a perpetual injunction restraining the defendant, its servants, agents and others working on its behalf from manufacturing, marketing, selling or offering for sale or otherwise dealing in Atta, Maida, Sooji, Bran etc. under the trademark 'MAHA

Shakti BRAND' or any other trade mark which may be deceptively similar to the plaintiff's trade mark 'SHAKTI BHOG'.

(2) In the suit the plaintiff has also filed an application under Order 39 Rules 1 & 2 of the Code of Civil Procedure seeking for an ad interim injunction restraining the defendants in the aforesaid terms from manufacturing the aforesaid articles under the trade mark 'MAHA Shakti BRAND' which may be identical and/or deceptively similar to the plaintiff's trade mark 'SHAKTI BHOG'.

(3) This court, while issuing summons to the defendants considered it fit to issue only a notice to the defendants on the injunction application and did not grant any ad interim injunction as prayed for by the defendants at that stage. Now ' the said injunction application has come up for .consideration and final disposal.

(4) I order to appreciate the points and issues urged by the counsel for the parties it is necessary to delineate and recapitulate certain facts giving rise to the suit.

(5) It is stated that the plaintiff has been using the trade mark 'SHAKTI BHOG' for their products. Flour (Atta), Gram Flour (Besan), Dal, Maida, Sooji, Bran and that the plaintiff is the first to adopt the said trade mark 'SHAKTI BHOG' in respect of the said products and is proprietor thereof under the law. According to the plaintiff the said trade mark 'SHAKTI BHOG' of the plaintiff is also duly registered in class 30 as. of 16.6.1982m respect of Flour, Dal, Besan and other preparations made from cereals under the provisions of the Trade & Merchandise Marks Act, 1958 (hereinafter re- ferred to as the Act). The user of the said trade mark by the plaintiff is from the year 1975 onwards and that the plaintiff has given vide publicity to the said trade mark and in view of the same the said trade mark 'SHAKTI BHOG' came to acquire a unique reputation and enviable goodwill among the public and trade.

(6) The defendants have recently started offering for sale and marketing of same goods - Flour (Atta), Maida, Sooji and Bran under the identical and/or deceptively similar trade mark 'MAHA Shakti BRAND', which use is in clear and flagrant violation of the plaintiff's legal, vested and statutory rights. According to the plaintiff the initial knowledge of the plaintiff of the defendant using identical and/or

deceptively similar trade mark was in the month of August, 1991 and accordingly on 5.9.19.91 the plaintiff issued a legal notice and the suit came to be filed in the month of April, 1992.

(7) The defendant contested the suit by filing a written statement contending inter alias that the plaintiff is not the original adopter, owner or user of the trade mark 'SHAKTI BHOG' in respect of the aforesaid articles and the word 'SHAKTI' is commonly used in all trades and the word 'BHOG' is descriptive of the goods having no trade mark value, and therefore, the plaintiff is not entitled to claim exclusive use of the word 'SHAKTI' which is common to trade and public juris. According to the defendant the trade mark of the defendant consists of a label containing at the top the device of Goddess Vaishmno Devi seated on a lion with legend 'MAHA Shakti BRAND' and at the bottom of the label appears the trading style of the defendant with address.

(8) It is stated that the defendant has been openly using the said trade mark - 'MAHA Shakti BRAND' with device of Vaishno Devi since 1990 and there could be no confusion or deception on the part of anyone as the two trade marks cannot be said to be either visually or phonetically similar.

(9) The principles governing the law of infringement and passing off and its distinction and similarity is no longer rest integra in view of the decisions of . the Supreme Court and the High Courts in K.R. Chinna Krishna Chettiar Vs . Sri Ambal & Co. & another : [1970]1SCR290 ; Ruston & Hornby Ltd. Vs . Zamindara Engineering Co. : [1970]2SCR222 ; K.R.Chinmkrishna Chetty Vs . K.Venkatesa Mudaliar & another : AIR1974 Mad7 ; East End Hosiery Mills Pvt. Ltd. Vs . M/s. Agarwal Textiles Mills, : AIR1971 Cal3 .

(10) The principle governing the grant of injunction in the matter of trade mark is also by now well settled by the decisions of the Supreme Court and the High Courts, which in my opinion need no reiteration.

(11) Learned counsel for the plaintiff also drew my attention to the various provisions of the Act and on the basis thereof as also on the basis of the decisions of the Supreme Court and this Court the counsel submitted that the prefix and

suffix to a word can also amount to a similarity which might cause deception or confusion in the minds of customers and purchasers of these articles which are purchased from the market by all classes of persons including the illiterate persons. In support of his submission the learned counsel relied upon the decision of the Supreme Court in K.R. Chinna Krishna Chettiar Vs . Sri Ambal & Co. & another : [1970]1SCR290 ; Ruston & Hornby Ltd. Vs . Zamindara Engineering Co. : [1970]2SCR222 ; K.R. Chinnikrishna Chetty Vs . K.Venkatesa Mudaliar & another : AIR1974 Mad7 (Supra).

(12) On the other hand the contentions of the defendant are that the word 'SHAKTI' is commonly used. The word 'MAHA SHAKTI' used by the defendant and 'SHAKTI BHOG' used by the plaintiff, both are descriptive words and therefore, there cannot be a case of passing off or an infringement in the present case. The counsel for the defendant, while addressing his arguments also relied upon a few documents including certain pages from the telephone directory to show that the word 'SHAKTI' is commonly used in trade circle and therefore, there cannot be any cause for infringement or passing off in respect of the words 'MAHA SHAKTI' or 'SHAKTI BHOG'. He also relied upon various decisions of the Supreme Court in f. Hoffman Lr. Roche & Co. Ltd. Vs . Geoffery Manners & Co.; reported in : [1970]2SCR213 , where the words Dropovif and 'Protovit' were held to be not deceptively similar. The learned counsel also relied upon the decision of the Supreme Court in the case of J.R. Kapoor v. Micronix India; reported in 1994 Ptc 260, where the words 'MICROTEL' and 'MICRONIX' were also held to be not deceptively similar:

(13) Learned counsel for the defendants also drew my specific attention to a decision of the Calcutta High Court in S.M.Chopra & Sons Vs . Rajendra Prasad Srivastava; : AIR1988 Cal326 wherein the concerned words were 'RAJA' & 'MAHARAJA' and it was held that they are not deceptively similar.

(14) I have given my analytical consideration to the submissions made by the counsel for the parties. The certificate of registration in respect of the articles in question having trade mark 'SHAKTI BHOG' has not been produced by the plaintiff. The question that arises for my consideration is whether the words 'MAHA

'SHAKTI' and 'SHAKTI BHOG' can be said to be descriptive and common in the business parlance and/or whether these two words are phonetically similar to each other. The words 'MAHA SHAKTI' and 'SHAKTI BHOG' although have a common word 'SHAKTI' but they do not sound to be similar when the two words are separately pronounced. The average or ordinary purchaser would be able to know the difference between the two when he goes to the market to buy the said product. It cannot be said that the said two words have a striking phonetic similarity so as to cause close resemblance to the ear. From the visual point of view also as shown to me by the learned counsel for the defendants during the course of arguments to two trade marks as used by them in their respective goods appear to be also visually dissimilar and therefore, the decision of the Supreme Court relied upon by the learned counsel for the plaintiff in *K.R. Chinna Krishna Chettiar Vs . Sri Ambal & Co. & another* : [1970]1SCR290 ; *Ruston & Hornby Ltd. Vs . Zamindara Engineering Co.* : [1970]2SCR222 ; *K.R.Chinnikrishna Chetty Vs . K.Venkatesa Mudaliar & another* : AIR1974 Mad7 (Supra) are not applicable to the present case.

(15) In my opinion it could be said that there is an innocent or accidental resemblance between the two trade marks but it cannot be said that the defendants have deceptively copied the trade mark in its letter and its essential features namely - 'SHAKTI BHOG'. 'SHAKTI' as we all know is strength and 'MAHA SHAKTI' is super strength, whereas 'SHAKTI BHOG' denotes food that gives strength. In their meanings also, therefore, the two words are dissimilar and it cannot be said that there is an imitation by the defendant of the plaintiff's trade mark and that the defendant is using the same with the sole object of diverting the business of plaintiff.

(16) In this connection I may appropriately refer to the decision in the case of *Coca Cola Company of Canada Ltd. v. Pepsi Cola*; 1942 (59) Rpc 127. In that case the question was whether the word 'COLA' was descriptive and commonly adopted in naming of beverages. It was held that 'Cola' was descriptive and commonly used by the manufacturers of non-alcoholic drinks. It was held that:

'THE distinguishing feature of the mark coca cola was coca and not cola. For the same reason the distinguishing feature of the mark Pepsi Cola was Pepsi and not cola. It was not likely that any one would confuse the word Pepsi with coca.'

(17) In the present case also prima facie it appears to me that the term 'Shakti' is commonly used in the business parlance as would appear from the few pages of the telephone directory produced in the present case and the word 'MAHA SHAKTI' is descriptive in nature. Even the word 'SHAKTI BHOG', in my prima facie opinion, is a descriptive word. We may also appropriately refer to the decision in F. Hoffman Lr. case (Supra) wherein the Supreme Court has held that where two words have a common suffix, uncommon prefix of the words is a natural mark of distinction. thereforee, in my opinion the decision rendered by the Supreme Court in the aforesaid case is squarely applicable to the facts of the present case.

(18) When the suit was filed, this court did not grant any ad interim injunction in favor of the plaintiff and against the defendants as prayed for and in the suit the issues have already been framed and the suit has been set down for trial for recording of evidence on 17th and 18th of January, 1997. thereforee, on taking an overall view of all the aforesaid factors into consideration I am prima facie of the opinion that issuance of interim injunction at this stage is not called for in the present case. Accordingly, the application filed by the plaintiff and registered as I.A.4066/1992 stands dismissed. It is made clear that the findings arrived at by me herein are my tentative and prima facie opinion and shall not be treated as my final and conclusive opinion on the merits of the case.

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