

Carlton and United Breweries Ltd. Vs. Harmohan Singh Chandhok and ors.

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Court : Delhi

Decided On : Sep-15-2005

Reported in : 123(2005)DLT676

Judge : Swatanter Kumar, J.

Acts : Trade Marks Act

Appeal No. : CS (OS) No. 859/2002

Appellant : Carlton and United Breweries Ltd.

Respondent : Harmohan Singh Chandhok and ors.

Advocate for Pet/Ap. : Manmohan Singh, Adv

Judgement :

Swatanter Kumar, J.

1. The plaintiff is a company organized and existing under the laws of the commonwealth of Australia having its office at 16 Bouverie Street, Carlton, State of Victoria, Australia, Mr. Surinder Singh is the constituted attorney and is duly authorised to sign and verify the pleadings and institute the present suit on behalf of the plaintiff company.

2. The plaintiff company, which is into the business of beverage, is dedicated to delivering quality beer, wine, spirits and leisure products to millions of consumers across the world.

3. It is the case of the plaintiff that it is engaged in a world-wide business together and through its subsidiaries of manufacturing and marketing of the said products. These products are stated to be subject to stringent quality testing with a focus on technical excellence and superior brand marketing. The goods of the plaintiff are sold in more than 150 countries including India. The company is the proprietor of, inter-alia, the trademark FOSTER'S and distinctive F device, which was adopted by the plaintiff's predecessors in or around the year 1889. The plaintiff has the registered trademark Foster's in Australia way back in 1909 and has grown to be a truly global corporation. The world-wide annual retail sales of FOSTER'S beer are in excess of \$6 million. They have 20 plants and sale of over 8 million hecto-litres.

4. In order to acquire statutory protection and recognition for the mark FOSTER'S and provide better protection against piracy, the plaintiff has obtained registered and/or applied for registration of the mark FOSTER'S and the distinctive F device in many countries of the world. In India the trade mark FOSTER'S with F Device has been registered in Class 32 under No. 387335B of the Fourth Schedule of the Trade Marks Act with effect from 15th July, 1993. Thus, the registration confers on the plaintiff the exclusive right to use the mark and to restrain use of any identical or deceptively similar mark by unauthorised persons.

5. It is further the case of the plaintiff that due to their excellent quality of product, advertising and promotion of the brand, they have become a well known and widely recognised beer brand all over the world including India. They enjoyed international reputation. Somewhere in the first week of March, 2002, the plaintiff's subsidiary in India was informed that an application was made by the defendant No. 2 with the office of the Commissioner of State Excise, Mumbai seeking excise license/clearance to manufacture and market 'Vodka and gin-n-lime' under the mark FOSTER. On receiving this information, the plaintiff made inquiries in the market and was told that no such product is currently being manufactured and marketed by the defendants. The plaintiff proceeded immediately to file a

complaint at the office of the Commissioner of State Excise on 8th March, 2002.

6. Defendant No. 3 has obtained registration of a label mark 'FOSTER LONDON DRY GIN' in Class 33 under No. 530071 wherein the defendants specifically given up their rights over the trademark 'FOSTER'. Hence, the defendants have stated to have no right pertaining to the trademark 'FOSTER'.

7. It is further averred by the plaintiff that the defendants have infringed trademark and has been passing of the goods as if the goods manufactured by them were manufactured by the plaintiff. thereforee, the plaintiff has brought the present suit for permanent injunction restraining the defendants from infringing the trademark, copyright and from passing of their goods as goods of the plaintiff and also for rendition of accounts. There is a specific prayer made by the plaintiff for delivery up of all goods, dies, blocks, carton, labels and any other material printed by the defendant in that behalf.

8. Summons in the suit were issued to the defendants. The defendants were served. They appeared before the Court and even filed the written statement.

9. In the written statement they had taken up a preliminary objections in regard to territorial jurisdiction of the Court, delay in bringing the action and that the goods of the defendants are totally different and are no where similar to the goods of the plaintiff. It is stated that goods of the answering defendants viz. Vodka and Gin-n-Lime are very different. The plaintiff cannot claim any exclusive monopoly over the rights for the use of the impugned trademark as the registered trademark is restricted to the goods in connection with which it is being used. According to the defendants they have been using the mark FOSTER since 1990 while the plaintiff started sale of such goods only in the year 2001 and as such the suit of the plaintiff need to be rejected.

10. Replication was filed reiterating the facts stated in the plaint as well as by giving additional facts and along with that documents were filed to establish the plea that there is no distinction between the goods and the defendants are taking advantage of reputation of the plaintiff and are causing infringement actionable in law.

11. From the record of the file it appears that on 9th February, 2004, the representative of defendant had appeared in person and an adjournment was prayed for, which was granted and the suit was ordered to be listed on 22nd April, 2004 for framing of issues and arguments on the injunction application. On that date, again a request was made on behalf of the defendant, which was allowed, subject to payment of cost of Rs. 5000. Vide order dated 24th August, 2004, the Court noticed that there was no specific denial of the averments made in para 14 of the plaint and also the fact that none was present on behalf of the defendants. The injunction prayed for was granted and the defendants were restrained from using the mark FOSTER for the sale of cognate products and in particular 'Vodka and gin-n-lime' by the name and mark of Foster. As nobody was appearing on behalf of the defendants, vide order dated 13th September, 2004, the plaintiff was granted opportunity to file evidence by way of affidavit. Vide order dated 20th January, 2005, the case was fixed for ex-parte evidence and the plaintiff was granted last opportunity to file ex-parte evidence by way of affidavit and if evidence was not filed the evidence of the plaintiff would stand closed. On 1st September, 2005, the following order was passed:

'Arguments heard. Judgment reserved.

Learned Counsel for plaintiff states that the plaintiff does not press the relief for claim of damages.'

12. The plaintiff in furtherance to the orders of the Court have filed evidence by way of affidavits. There are two affidavits on record. One is of Mr. Owen John Malone, Vice President of the plaintiff company and the other of Mr. Surinder Singh. The power of attorney in favor of Mr. Surinder Singh is marked as Exh.PW-1/1. The affidavit of Mr. Surinder Singh is exhibited as Exh. PW1/A. In the affidavit of Mr. Owen John Malone, the entire literature and brochure of the plaintiff's company has been marked as Exh. PW1/1. The sale invoices of the plaintiff company in India is marked as Exh. PW1/2. The annual report of the plaintiff company for the year 2000 is marked Exh. PW1/3 while the registration, which the plaintiff has obtained in the mark FOSTER and distinctive F device in many countries of the world and the list of countries is annexed to the affidavit as Exh.

PW1/4. PW1/5 is the legal proceeding certificates showing that the registration confers on the plaintiff the exclusive right to use the mark and to restrain use of any identical or deceptively similar mark by unauthorised persons. In paragraph 17 of this affidavit it is stated as under:

'17. I say that further inquiries indicate that Defendant No. 3 has obtained registration of a label mark 'FOSTER LONDON DRY GIN' in Class 33 under No. 530071 with a disclaimer of the word 'FOSTER'. A copy of the advertisement of the mark from Trade Marks Journal No. 1203 (Supply) dated July 21, 1999 page No. 127 is submitted herewith and marked as EX PW 1/7 original trademark Journal is in possession of plaintiff which may be seen and return.'

13. In addition to the above evidence, the plaintiff has heavily relied upon the vague averments in the written statement and there being no specific denial. Exh. PW1/3 is the certificate issued for trade mark No. 387335 in Class 32 in relation to FOSTER'S (DEVICE) by the Examiner of Trade Marks, Government of India. During the course of hearing, learned Counsel for the plaintiff, though the matter was being heard ex parte, heavily relied upon the Judgments of the Supreme Court and this Court in support of his contentions that the delay alleged to have been caused is inconsequential so far as the plaintiff can establish the infringement of his trademark and copyright.

14. In the case of Swarn Singh v. Usha Industries, : AIR1986 Delhi343 , a Division Bench of this Court took a view that delay normally would not be fatal to grant of an injunction as exclusive right is granted by the registration to the holder of a registered trade mark and such statutory right cannot be lost by delay.

15. In the case of Hindustan Pencils v. India Stationery, : AIR1990 Delhi19 again the Court took the view that where infringement is deliberate and willful and the defendant acts fraudulently that he is violating plaintiff's rights, essential elements of estoppel are lacking and in such a case the protection of plaintiff s right by injunctive relief never is properly denied.

16. In regard to the fact that the plea of the defendants that goods of the defendant are different to the goods produced by the plaintiff, counsel while relying upon the

Judgment of the Supreme Court in the case of Corn Products Refining Co. v. Shangrila Food Products Ltd., : [1960]1SCR968 argued that the wrongs of the defendants give definite right to the plaintiff in view of the following dictum of the Supreme Court:

'It is true that in both the above-mentioned cases the two competing trade marks were absolutely identical which is not the case here. But that in our opinion makes no difference. The absolute identity of the two competing marks or their close resemblance is only one of the tests for determining the question of likelihood of deception or confusion. Trade connection between different goods is another such test. Ex hypothesis, this letter test applies only when the goods are different. These tests are independent tests. There is no reason why the test of trade connection between different goods should not apply where the competing marks closely resemble each other just as much as it applies, as held in the 'Black Magic' and 'Panda' cases, where the competing marks were identical. Whether by applying these tests in a particular case the conclusion that there is likelihood to deception or confusion should be arrived at would depend on all the facts of the case....'

17. In the present case, the defendants have specifically pleaded that their goods are not similar and thus, they are not infringing the trademark of the plaintiff. It is not disputed that they are manufacturing, selling and offering for sale 'Vodka and Gin-n-Lime' while the trademark the plaintiff is using for beer etc. The two set of goods are of same description.

18. The plaintiff is well established company and is Having world-wide reputation with the trademark FOSTER with F Device and as such the defendant cannot be permitted to infringe the trademark of the plaintiff which the plaintiff is using since 1889. They are also infringing the copyright of the plaintiff with F device and are passing of their goods as they were the goods of the plaintiff if not exactly at least deceptively. Learned Counsel for the plaintiff has already given up the claim of the damages.

19. In view of the above discussion, a decree is passed in favor of the plaintiff and against the defendants for permanent injunction restraining the defendants, their

partners or proprietors, their officers, servants, agents and representatives from manufacturing, selling and offering for sale Vodka and gin-n-lime' or any other spirits or liquor products under the mark FOSTER or under any other mark deceptively similar to the plaintiff trademark FOSTER'S and F device and pass of their goods as those of the plaintiff. The plaintiff shall be entitled to his costs in the suit.

20. The suit stands disposed of.

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