

(2016) 07 MAD CK 0077
In the Madras High Court
Case No : C.S. No. 89 of 2008

A.D. Padmasingh Isaac Trading as Aachi Spices and Foods	APPELLANT
Vs	
K. Satheesh Kumar	RESPONDENT

Date of Decision : 27-07-2016

Acts Referred:

Trade Marks Act, 1999 — Section 135

Citation : (2016) AIR(Madras) 205

Hon'ble Judges : Mrs. Pushpa Sathyanarayana, J.

Bench : Single Bench

Advocate : No Appearance, for the Defendant; Ms. Gladys Daniel, Advocate, for the Plaintiff

Final Decision : Disposed Off

Judgement

Mrs. Pushpa Sathyanarayana, J. - The suit is filed by the plaintiffs against the defendant for the following reliefs:

(a) to grant permanent injunction, restraining the defendant, by itself, its servants, agents, distributors, or anyone claiming through him from manufacturing, selling, advertising and offering for sale using same or similar mark AACHI MASALA or any other similar Trade Mark or in any media and use the same in invoices, letter heads and visiting cards or by using any other trade mark which is in any way visually or deceptively or phonetically similar to the plaintiffs' trade mark AACHI or in relation to any Mineral Water and use the same pouches, packets or use the mark in invoices, letter heads and visiting cards or any other trade literature or by using any other trade mark which is in any way visually or phonetically similar to the plaintiffs' registered trade mark Nos. 922594, 922595, 1318494 & 1318495 or in any manner infringe the plaintiffs' registered trademark;

(b) to direct the defendant to surrender to the plaintiffs' all the packing material, cartons, advertisement materials and hoardings, letter-heads, visiting cards,

office stationery and all other materials containing/bearing the name AACHI or other deceptively similar trade mark used in the pouches and packets in respect of masalas.

(c) to direct the defendant to render an account of profits made by them by the use of the impugned trade mark ACHI MASALA on the goods referred and decree the suit for the profits found to have been made by the defendant, after the defendant has rendered accounts.

(d) directing the defendant to pay costs of the suit to the plaintiffs.

2. The first plaintiff is a Proprietary concern manufacturing and marketing various kinds of masalas and spices. The first plaintiff had applied for the registration of trade mark "AACHI" under Application No.922594 on 04.05.2000 in Clause 29 and Application No.1318495 in Clause 30 and the registration was duly granted. It is also stated that the plaintiffs had applied for registration in various Clauses. According to the plaintiffs, their trade mark "AACHI" has become common household name, as they have now become one of the leading manufacturers of packaged masala powders. Therefore, only the plaintiffs are the exclusive owners of the trade mark "AACHI" and any unauthorised use of the same mark or similar trade mark would amount to passing off an infringement.

3. In February 2005, the plaintiffs" came across the defendant"s Mineral Water bearing the mark AACHI. On 03.02.2005, the plaintiffs" sent a cease and desist notice, calling upon the defendant to cease and desist from using the deceptively similar trade mark AACHI. Unfortunately, the plaintiffs" trade mark agent had erroneously issued the notice on behalf of Ashwin Enterprises instead of Naveen Products. After the notice the defendant"s goods were not available in the market. However, the plaintiffs" apprehend that the product viz., mineral water of the defendant is likely to be available in all places, wherever the plaintiffs" mineral water is also marketed. As the trade mark of the defendant is phonetically similar to the plaintiffs" trade mark, the defendant has with a malafide intention of taking undue advantage of the same, has adopted the same trade mark. The trade marks of both the plaintiffs" and the defendant are phonetically similar and is likely to create confusion in the mind of a common man.

4. It is the claim of the plaintiffs that they have started the business using the trade mark "AACHI" with respect to spices and masala powders since 1995, whereas, the defendant is only a recent entrant to the field. The defendant has got no valid reason to use the same trade mark as that of the plaintiffs, which is structurally, phonetically and visually identical, to that of the plaintiffs. It is also stated by the plaintiffs that along with the suit, O.A. No. 120 of 2008 was filed for injunction, restraining the use of the trade mark "AACHI" by the defendant and an order of interim injunction was granted by this Court on 06.02.2008. The defendant was set ex parte on 01.06.2016, despite the fact that he was served as early as on 17.11.2008 of the suit summons.

5. On the side of the plaintiffs, one Mr. B. Gnanasambandam, Senior Manager of the plaintiffs' company was examined as P.W.1. The plaintiffs have marked as many as 13 documents Exhibits P1 to Ex. P13 in support of their case. The documents viz., Exs. P4, P5 and P6 are all certificates of registration of the plaintiffs' trade mark and Ex. P7 is a trade mark certificate and Ex. P9 is the certificate issued under the Central Sales Tax Rules 1957. The certificates of registration under TNGST and VAT are also marked as Exs. P11 and P12, in addition to the filing of the suit notice and the reply notice.

6. Heard the learned counsel appearing for the plaintiffs and perused the materials available on record.

7. The only question that has to be decided by this Court is whether the plaintiffs are entitled to a decree as prayed for.

8. It is contended that if one was not careful enough to note the peculiar features of the wrapper on the plaintiffs' goods, will undoubtedly mistake the defendant's wrapper for the plaintiffs' if shown to him sometime after the consumer had seen the plaintiffs'. Any purchaser who is familiar with the plaintiffs' goods may buy the defendant's goods assuming that the plaintiffs' had diversified into Mineral water. In the instant case, the unwary purchasers of average intelligence with the imperfect recollection will undoubtedly mistake one for the other. It would be enough if the impugned mark bears such an overall similarity to the mark as would be likely to mislead a person usually dealing with one to accept the other if offered to him. Further, it is contended that the defendant's trade mark is a blatant imitation of the plaintiffs' trade mark and the same has been adopted for evil intention of commercial gain for which the defendant is not entitled under law. The defendant is using the deceptively similar mark of the plaintiffs'.

9. As the plaintiffs' have been carrying on business using the trade mark AACHI, with respect to masalas since 1995 and the defendant is a recent entrant into this filed, considering these facts, as a prior user and a registered trade mark owner, the plaintiffs' have exclusive right to the trade mark AACHI.

10. It is settled law that no man is entitled to represent his goods or business as being the goods or business of another person, whether such representation is made by the use of any mark, name, sign, symbol, device or other means.

11. Considering the oral and documentary evidence viz., Exs. P1 to P7 adduced by P.W.1, this Court is of the view that the plaintiffs' have proved the suit claim against the defendant and hence, the plaintiffs are entitled for the reliefs against the defendant, as asked for.

12. In the result, the suit is decreed as prayed for by the plaintiffs. No costs.