

(1996) 07 DEL CK 0107

In the Delhi High Court

Case No : Interim Application No's. 9786 of 1994 and 4170 of 1996 and Suit No. 2510 of 1994

Advani Oerlikon Ltd.

APPELLANT

Vs

Lalit Ahuja Trading as Ahuja Associates

RESPONDENT

Date of Decision : 16-07-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 4

Citation : (1996) 3 AD 785 : (1996) 63 DLT 728 : (1996) 38 DRJ 489

Hon'ble Judges : K. Ramamoorthy, J

Bench : Single Bench

Advocate : Manmohan Singh, H.P. Singh and R.K. Sharma, for the Appellant;

Judgement

K. Ramamoorthy, J.

(1) The plaintiff has filed the suit against two defendants for injunction restraining the defendants from selling, manufacturing, offering for sale and distributing welding electrodes under the infringing trade mark Ador, Overcord, Superinox and Advani - Oerlikon and packing material used by the plaintiff.

(2) It is not necessary to refer to the allegations mentioned in the plaint in detail excepting slating that the trade mark of the plaintiff are registered and the sales figures which are given in the plaint and the excise duty paid for the purpose of showing the business done by the plaintiff are given. They are as follows:

Financial Year Excise Duty Paid 1984-85 Rs. 872 lakhs 1985-86 Rs. 1066 lakhs 1986-87 Rs. 1201 lakhs 1987-88 Rs. 1.976 lakhs 1988-89 (18 months) Rs. 1967 lakhs 1989-90 Rs. 1747 lakhs 1990-91 Rs. 1981 lakhs 1991-92 Rs. 2304.75 lakhs 1992-93 Rs. 2737.44 lakhs 1993-94 Rs. 2393.36 lakhs

(3) The case of the defendants, in short is that they are only selling electrodes in a very small place and they are not manufacturing and Therefore, the plaintiff cannot claim any relief against the defendants. The first defendant is Mr. Lalit Ahuja doing business under the name M/s Ahuja Associates which is shown as

the second defendant.

(4) In para 10 of the plaint the plaintiff has given details about the method adopted by the defendants for selling the electrodes in the following manner:

"THAT in the month of August, 1994 the plaintiffs came to learn that the defendants have commenced marketing stainless steel electrodes and steel electrodes under the trade mark Ador Arc welding electrodes, Advani Oerlikon crossed on the plastic container and printing sticker on the printing container marked SUPERINOX-IA and steel electrodes bearing the mark Advani Oerlikon, Ador trade mark is printed on the carton and sticker marked Overcord, Advani OERLIKON. The packing of the defendants is submitted herewith as Annexure "C" and "D" respectively. The plaintiff states that the said packing of stainless steel electrodes and steel electrodes arc identical and confusingly similar with the packing used by the plaintiff for their product like Annexures A and B. In order to make deception complete the defendants have deliberately used the house mark Advani Derlikon with the identical style of their packing for Ador in respect of the above said goods. The packing material like Annexure "C" and "D" adopted by the defendants is identical packing with the packing used by the plaintiffs. The defendants are even using the name of the company of the plaintiff on their packing material. The plaintiff submits that the said packing material like Annexure "C" and "D" do not belong to the plaintiffs and is of spurious quality products which arc not manufactured by the plaintiff. The printing of electrodes and labels is of very poor quality. The printing carton of the product used by the defendants is very light colour as compared to plaintiffs printing. The coaling factor of the product is high i.e. 1.69 against 1.65. The chemistry of wire Sp is high which has never been used by the plaintiff company. The printing done by the defendants on electrodes is also not visible as compared to the printing of electrodes of the plaintiff. The colour of the electrodes are also different. The sizes of the words and bold letters used by the defendants are also different as compared to the sizes of the letters and words used by the plaintiff company."

(5) The plaintiff has also given how the defendants who are not the dealers and stockists of the plaintiff have adopted the trade mark, get up, design for the said packing of the products and using the reputation of the plaintiff in the following terms:

"THE plaintiff states that the defendants who are not the dealers and stockists of the plaintiff have adopted identical trade marks, get up, design for the said packing of the products. The defendants have even given fraudulently the name and the address of the plaintiffs on the said packing of the products manufactured and marketed by the defendant. The products sold by the defendants under the said trade mark is a resinous product which is Chemically different than the original product manufactured by the plaintiff. The plaintiff state that the defendants are indulging in the said activities in a clandestine manner and they also to the best of their knowledge are not issuing any cash memo or any voucher for the sale of the said spurious products bearing the

impugned trade marks. The plaintiff through Notary Public on 20th September, 1994 purchased the following goods from the factory/premises of the defendants: a) 12 plastic containers 2.50 X 350 size Stainless Steel, Electrode (each containing 110 electrodes) marked Ador, Arc welding Electrodes "ADVANI DERLIKON" embossed on the plastic containers and a printed sticker on the plastic container marked Superinox-IA. Manufacturing date, 5th June, 1994, B.No. 16290 Mfg. at Advani Oerlikon Ltd., Melakottaiyour, Village via Vandalur Distt. Chingleput, Madras - 60048 (India) and Electrodes marked Superinox-IA, E-308-16, (a) Rs. 1034.00 per pkt, total value Rs. 12.408.00 . b) 2 Cartons of Mild Steel Electrodes, size 4.00 X 450 Mm (each carton containing 4 packets of 95 electrodes per packet) marked Advani Oerlikon, Ador on the printed carton and a printed sticker marked Overcord Advani Oerlikon Size 4.00 X 450 M.M. Mfg. dated 25th April 1994 batch No. 2.010. Mfd. at M/s Advani Oerlikon Limited, Industrial Estate, Bilaspur Road, Raipur - 492001 (India) and the electrodes marked Overcord E 6013 @ Rs. 1150.00 per carton. Total value Rs. 2300.00 ."

(6) The plaintiff further stated that "the first defendant was a former employee of the Company of the plaintiff, namely, M/s Cosnic Fontec Ltd., Surya Kiran, Kasturba Gandhi Marg, New Delhi. It is pertinent to note that the corrugated box as well as the plastic containers new packing of the plaintiff which were introduced in the market only from September, 1993 and the defendants corrugated box contains the "date of manufacture" as 25th April 1993 when the said packing material was never in picture and was not being used by anyone in India."

(7) It is the case of the plaintiff that sub- standard materials are sold by the defendants using the name of the plaintiff. Therefore, it has become necessary to file the suit claiming the relief. The plaintiff had filed a Notary report showing that the defendants are selling the products using the name of the plaintiff.

(8) The defendants filed is No. 4170/96 under Order Xxxix Rule 4 Civil Procedure Code. It is slated in the application that the defendants have never manufactured or marketed any goods except the goods of the plaintiff which they have been purchasing from the authorised dealers of the plaintiff and all the goods sold by the defendants were the goods of the plaintiff. The defendants had also challenged the Notary Report filed by the plaintiff. According to the defendants reliance on the Notary Report for the purpose of sustaining the case is not proper. The defendants had also relied upon the bills issued by the dealers for the sale of the materials which, according to the defendants, show that they are selling only the plaintiff products.

(9) The learned counsel for the parties relied upon the decisions of this court which express conflicting views on the point whether report of the Notary public can be relied upon or not. I do not want to go into the controversy now. It is not necessary to go into that question in this case. At the time of the hearing I saw the products of the plaintiff and also the containers of the plaintiff in which the products are sold and the products sold by the defendants. I was really not able

to come to any conclusion when the defendants said that they arc not manufacturing any products and they arc only selling the products of the plaintiff. It looked innocent at the first blush. But on a closer scrutiny it could be seen that the defendants had adopted a subterfuge and had been using the reputation of the plaintiff for selling sub-standard articles. Defendants apparently think that they can get over the situation by projecting the case that they arc only selling the products of the plaintiff from getting it from dealers and Therefore, they arc not aware of the fact the products sold by them are not products of the plaintiff. It is all a tell - tale story which cannot be accepted by any Court. If the defendants are telling us the truth then they would not be put to any prejudice by the grant of injunction. It is not explained as to why they did not seek any direct contact with the plaintiff for the selling of the products of the plaintiff. In trade people adopt different tactics to do business using the reputation of others. That cannot be permitted and that is why the trade mark jurisprudence has developed all over the world. Accordingly, I find that the Applicant/plaintiff has made out a strong case for the grant of injunction. The balance of convenience is in favor of the plaintiff. Accordingly, is No.9786/94 filed by the plaintiff under Order Xxxix Rules 1 and 2 is allowed. There shall be an injunction restraining the defendants, their servants, agents, shopkeepers, stockists and representatives from manufacturing, selling, offering for sale, distributing or advertising directly or indirectly dealing in welding electrodes or any other allied and cognate goods under the infringing trade marks Ador, Overcord, Superinox and ADVANI-OERLIKON and its logo and the packing material like Annexure C and D and the packing material which is identical or deceptively similar with the plaintiffs trade mark and packing material pending the disposal of the suit. is No. 4170/96 filed by the defendants under Order Xxxix Rule 4 is dismissed. Post the matter for further proceedings on 28. 10. 1996.