

(1989) 11 DEL CK 0027

In the Delhi High Court

Case No : Interim Application No. 3454 of 1987

Asso Auto Accessories Co. (P) Ltd.

APPELLANT

Vs

ESS PEE Auto Enterprises

RESPONDENT

Date of Decision : 10-11-1989

Acts Referred:

Citation : (1989) 2 ARBLR 448 : (1990) 40 DLT 356 : (1990) 18 DRJ 116

Hon'ble Judges : C.L. Choudhary, J

Bench : Single Bench

Advocate : K.L. Aggarwal and O.P. Narang, for the Appellant;

Judgement

Chandhry, J.

(1) M/S. Asso Auto Accessories Co. Pvt. Ltd. has filed this suit by which a perpetual injunction restraining the defendants from manufacturing, selling or otherwise dealing with auto electrical parts etc., under the trade mark Asco or any other trade mark identical or deceptively similar to the plaintiff's registered trade mark Assu is claimed. The claim is based on the following allegations : The plaintiff and its predecessors-in title have been engaged in the business of manufacturing and marketing of auto parts and accessories under the name and style of Asso Auto Accessories since 1-4-1968, and have been using the trade mark Assu which mark duly stands registered in the name of the plaintiff in Class 12 of the Trade and Merchandise Marks Act. Registration is stated to be still valid. plaintiffs had given wide publicity to its mark Assu and the trade name Asso Auto Accessories Company and the products under the mark Assu connote and denote the goods and merchandise of the plaintiff's origin and of none else. plaintiff's sales of the goods under the said mark are claimed to have gone in several lakhs of rupees. The trade mark and the trade name of the plaintiff have acquired unique reputation and good-will in public.

(2) The defendants have recently started the manufacture and marketing of auto electrical parts, auto lamps etc., under and identical and/or deceptively similar

mark ASCO. The use and adoption of the trade mark Asco by the defendants amounts to infringement of the plaintiff's well known and registered trade mark Assu, and it amounts to clear and flagrant violation of the legal rights vested in the plaintiff. The confusion and deception is inevitable amongst the public and trade due to close and deceptive similarity and resemblance, visual as well as phonetic between the two trade marks ASSU/ASSO and ASCO. The defendants are passing off sub stands products as and for the quality products of the plaintiff. In these premises the injunction is claimed against the defendants.

(3) The suit is being contested on behalf of the defendants. The plea taken is that the plaintiff has deliberately and intentionally not disclosed that the alleged registration held by the plaintiff is for the goods different from the ones for which the defendants are using the trade mark which falls in class 11 of the Fourth Schedule of Trade and Merchandise Marks Rules 1959 and the registrations held by the plaintiff are for motor-parts and these goods fall in class 12. The trade mark Asco of the defendant is altogether different from the trade mark Assu of the plaintiff. The trade mark Asco is an invented word having no meaning at all which has special protection under the provisions of Trade and Merchandise Marks Act, 1958. The trade mark Assu is an ordinary Hindi word meaning-"tears". The plaintiff had knowledge about the use of the mark Asco by the defendants since 6-2-1985 when the trade mark of the defendants was advertised in the trade mark journal dated 1-2-1985 to which they had filed notice of opposition before the Registrar of Trade Marks, New Delhi. Those proceedings are still pending. The plaintiffs have not filed any documentary evidence to prove that their predecessor-in title were not engaged in the business of manufacturing or marketing of auto parts and accessories of Motor land vehicles. The trade mark Assu is registered in the name of Asso Auto Accessories. It has been denied that the registration of the alleged trade mark of the plaintiff is still valid subsisting and effective throughout India on the ground that the registered proprietors are not using these marks and they have already abandoned these marks and these marks are liable to be removed from the register on account of non-user under the provisions of Section 46 of the Trade and Merchandise Marks Act, 1958. There is no evidence on record to show that the plaintiff has advertised the mark and publicity was given to it by them and virtue of that it has acquired unique reputation and good-will. The defendants are engaged in the business of manufacturing and marketing the aforesaid goods since November 1981. They have applied for the registration of the mark Asco and the proceedings are pending. The mark Assu is phonetically as well as visually different from the mark Asco of the defendants. The plaintiffs do not hold any statutory right to the marks Assu and the name ASSO. The question of deception or confusion does not arise. The defendants are not passing off their goods as that of the plaintiff".

(4) The plaintiffs have filed an application under Order 39 Rules 1 and 2, (which is under disposal) by which temporary and interim injunction is claimed, so as to restrain the defendant from using the mark Asco during the pendency of the suit.

The application is almost repetition of the allegations made in the plaint. In order to claim a temporary injunction it is stated that the plaintiff shall suffer irreparable loss and injury to its business and reputation if the defendants are not restrained immediately from using the trade mark Asco and selling their goods under this mark. The goods of the defendants under the mark Asco were seen in the market for the first time in April 1987.

(5) The reply to this application is almost on the same pleas as taken in the written statement and reproduced earlier.

(6) In the rejoinder filed to the reply of the defendant it is stated that the trade mark Assu of the plaintiff is registered in class (12) and also registered in class (11). The other pleas as raised in the plaint as well as in application have been reiterated.

(7) I have heard the learned counsel for the parties and have gone through the material placed on record.

(8) The plaintiff has produced on record the certificate of registration dated 4-3-1974 which shows that the mark Assu stands registered in the name of Avtar Singh, Paramjit Singh, Narinder Pal Singh, Rajinder Pal Singh and Surinder Pal Singh, trading as Asso Auto Accessories Company, in class (12) for motor vehicles. Plaintiffs have also filed the certificate dated 9-4-1975 which shows that the mark Assu stands registered in the name of Avtar Singh, Paramjit Singh, Narinder Pal Singh, Rajinder Pal Singh and Surinder Pal Singh, trading as Asso Auto Accessories Company, in class (11). The plaintiffs have also filed list of sales figures pertaining to the years 1967-68 to 1981-82. The sales pertaining to the year 1981-82 are Rs. 22,81,822.30. Publicity and advertisement material has also been filed by the plaintiffs in respect of the mark ASSU. Also placed on the file are certain invoices showing certain sales of auto lamps etc., in the name of M/s. Asso Auto Accessories Company Registered.

(9) On the side of the defendants no document has been produced. From the material placed on record it appears that the mark of the defendant had acquired high reputation and was well known in the market and had come to mean the products of the plaintiff. It was contended on behalf of the defendants that the plaintiff is not registered under Clause 11. However, the perusal of the certificate placed on the record by the plaintiff shows that the mark also stands registered under Clause 11.

(10) The plaintiff is a registered proprietor of the mark. The registration of the trade mark per se, if valid, confers on the proprietor of the mark the right u/s 28(1) to the exclusive use of the mark in relation to the goods in respect of which it is registered. That is to say, the right to exclude others from the use of the trade mark. However, the rights conferred u/s 28, 28(1) are subject to the conditions and limitations contained in Sections 28(2) and (3), 30(1), (b) and (c), 33 and 23.

(11) The factors for determining whether a particular trade mark is deceptively similar to another mark or is likely to deceive or cause confusion are enumerated in a judgment of this Court in *Essco Sanitations Vs. Mascot Industries (India)*, as under :- "(1) The nature of the marks; (2) the degree of resemblance between the marks phonetic, visual as well as similarity in ideal ; (3) the nature of goods in respect of which they are used or are likely to be used as trade marks; (4) the similarity in the nature, character and purpose of the goods of the rival traders ; (5) the class of purchasers who are likely to buy the goods bearing the marks, their level of education and intelligence, and the degree of care they likely to exercise in purchasing the goods ; (6) the mode of purchase of goods or of placing orders for the goods ; and (7) any other surrounding circumstances."

(12) It was further held that "while considering the possibilities of phonetic confusion," the words must not be subjected to a meticulous individual analysis. Only some structural examination of the words is permissible to find out if the marks possessed any outstanding characteristic that would inevitably create a more or less lasting impression on the hearer's mind.

(13) In that case the trade mark "ESSCO" and the mark "OSSO" were held to be deceptively similar, the registered mark of the plaintiff is "ASSU". The offending trade mark is "ASCO". I have compared the two words. The resemblance between the two marks is extremely close. The two marks are too close phonetically, visually and similarity in ideal. There is no manifest difference. The ordinary customers who are likely to purchase these goods are not expected to carry in their heads the minute details of the registered trade mark of the plaintiff. The purchaser will seldom have before him the mark when he makes the purchase. He cannot retain in his mind every detail of the mark which he has once seen. Very often he will have only a general recollection of what the nature of the trade mark is. It would be impossible for them to decipher an imperceptible difference.

(14) I am prima facie of the opinion that the trade mark Asco adopted by the defendants is deceptively similar to the registered trade mark "ASSU" of the plaintiff. The plaintiff has been able to make out a prima facie case for the grant of an injunction. The balance of convenience is also in favor of the plaintiff, and in case the defendants are not restrained the plaintiff is likely to suffer irreparable loss.

(15) The result is that this application is allowed, the defendants are restrained from manufacturing, selling, offering for sale and otherwise dealing in the auto electrical parts, auto lamps, auto bulbs or lights for use in motor land vehicles under the trade mark "ASCO" or any other trade mark which may be identical and/or deceptively similar to the registered trade mark "ASSU" of the plaintiff.

(16) Any observation made herein shall not be construed as having been expressed as opinion in respect of any matter which may arise at the time of

final decision of the case.

(17) The I.A, is disposed of. No orders as to costs.