
(2006) 11 RAJ CK 0034
In the Rajasthan High Court

B.I.C. Sales Corporation and Another	APPELLANT
Vs	
Tinwari Automobiles and Another	RESPONDENT

Date of Decision : 20-11-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Trade and Merchandise Marks Act, 1958 — Section 105

Citation : (2007) 34 PTC 366

Hon'ble Judges : Dinesh Maheshwari, J

Bench : Single Bench

Judgement

Dinesh Maheshwari, J.—Heard learned Counsel for the parties in both these Appeals, CMA No. 816/2003 and No. 897/2003, on admission and on prayer for interim relief.

2. These two appeals have been preferred by the defendants against the same order dated 30.07.2003 passed by the Additional District Judge (Fast Track) No. 2, Udaipur in Civil Misc. No. 14/2003 issuing temporary injunction in favour of the plaintiff in an action u/s 105 of the Trade and Merchandise Marks Act, 1958 ["the Act"] after finding that there is a prima facie case in the suit where plaintiff has raised such bona fide questions regarding previous user of the unregistered trade mark "BIC" that require further investigation and inquiry. While considering irreparable injury and balance of convenience, the learned trial Court observed that it was to be decided in the main suit as to who was the prior user of the disputed trademark of the goods in question and as prima facie case was found in favour of the plaintiff, if the defendant would not be restrained from using the disputed trademark, the plaintiff would suffer irreparable loss and so also loose its business goodwill; and any disturbance in goodwill is such an injury that cannot be measured in monetary terms.

3. It has been strenuously contended by the learned Counsel for the appellants in these appeals that even from the documentary evidence produced by the plaintiff, it is apparent that the firm M/s. Tinwari Automobiles, of which the

plaintiff refers herself as the Proprietor, had only been the sole selling agent of the tractor parts in question manufactured by the appellant Bharat Lal in his proprietorship concern M/s. Bharat Industrial Corporation; and that the learned trial Court has seriously erred in granting temporary injunction despite there being no prima facie case in favour of the plaintiff whose co-relation with the firm M/s. Tinwari Automobiles is itself in serious doubt.

4. Having regard to the observations made by the learned trial Court and the record of the case referred by the parties, this Court is of opinion that the appeals require consideration on merits.

5. Though learned Counsel for the parties have pointed out that the matter had been heard on the earlier occasions by this Court, however, the record shows that in these appeals filed in the year 2003, there is no such order for hearing these appeals finally out of turn at this stage of admission. Arguable questions arising, these appeals deserve to be admitted for final hearing; hence, admit.

6. Learned Counsel Mr. J.P. Joshi has put in appearance for the plaintiff, respondent No. 1 in both these appeals. Other respondents in either of the appeal are the appellant(s) in the other appeal and learned Counsel Dr. Ashok Soni represents all of them. Therefore, service is complete. Noticer need not be issued.

7. On the question of grant of interim relief during pendency of these appeals, learned Counsel Dr. Soni has referred to a decision of Hon''ble Supreme Court in Uniply Industries Ltd. Vs. Unicorn Plywood Pvt. Ltd. and Others, and has relied upon observations made in paragraph 8 with the submissions that the learned Court below in the present case has not looked at other aspects involved in the matter and even while considering prima facie case has over-looked the material available on record and, therefore, during the pendency of these appeals, operation and effect of the impugned order deserves to be stayed.

8. Per contra, learned Counsel Mr. J.P. Joshi appearing for the plaintiff M/s. Tinwari Automobiles, has referred to the decision of the Hon''ble Supreme Court in the case of Laxmikant V. Patel Vs. Chetanbhat Shah and Another, and while relying upon the observations made in paragraphs 13 and 14 of the said decision, learned Counsel contended that in such action of passing-off seeking and granting of injunction, temporary or ad interim, is an integral part of the action and how the injunction is to be granted by the Court would depend on facts and circumstances of each case; but once a case of passing-off is made out, it is desirable and generally is a practice to grant a prompt injunction. Learned Counsel Mr. J.P. Joshi has referred to another decision of the Hon''ble Supreme Court in Satyam Infoway Ltd. Vs. Sifynet Solutions Pvt. Ltd., and referred to the observations made in paragraph 34. Learned Counsel has also strenuously contended with reference to their decision of the Hon''ble Himachal Pradesh High Court in Om Prakash and Anr. v. The Board of School Education for Himachal Pradesh and Ors. AIR 1975 H.P57 that in the present case despite

temporary injunction having been granted against them, the defendants have continued with their activities and have not refrained from using the trademark in question and are continuing with their manufacturing and selling activities of the goods with the same trademark and this conduct amounts to contempt and unless they purge the contempt, they should not even be heard on merits of the case.

9. As noticed above, the trial Court has observed that the matter requires further investigation and hence has found *prima facie* case in favour of the plaintiff and the learned trial Court has found it proper to issue temporary injunction else the same would cause irreparable injury to the plaintiff. It has been contended in these appeals that while granting injunction, the trial Court has over-looked the material available on record. On the facts and in the circumstances of the case, where arguable questions do arise in these appeals, this Court is of opinion that the impugned order, if permitted to continue in operation, the same might cause greater inconvenience and it does not appear appropriate or in the balance of equities that such order be permitted to continue pending consideration of these appeals on merits.

10. The decisions relied upon by the learned Counsel for the parties essentially proceed on their own facts. It is of course true that in such trademark matters, if a strong *prima facie* case is made out, grant of injunction may be considered after weighing the balance of convenience; however, this Court is unable to find from the subject matter of dispute in the present case that the respondent-plaintiff would be put to serious inconvenience or hardship if the temporary injunction is not continued.

11. It is noteworthy that from the pleadings as taken in the plaint it is apparent that the dispute between the defendant Bharat Lal and the erstwhile partner of the firm M/s. Tinwari Automobiles, Chunni Lal, having taken place in the year 1999 in the Courts at Jodhpur and orders having been passed therein in the year 1999 are in the knowledge of the plaintiff. According to the averments in the plaint, the plaintiff has made application for registration of the trademark in question in the year 1998 whereas the defendant has made such application in the year 1999. Without commenting anything on merits of the case, suffice it to point out at this stage that in view of the averments taken by the plaintiff, it cannot be said that there was no delay in filing the suit by the plaintiff as was the case in *Laxmikant v. Patel* (supra) as noticed by the Hon'ble Supreme Court in paragraph 16. The plaintiff has chosen to file the suit in the Court at Udaipur only on 02.02.2001, though both the parties are stated to be having their place of residence and their business addresses at Jodhpur, with the submissions that the cause of action arose at Udaipur upon selling of the goods by the defendant at Udaipur. In the circumstances of the case and the nature of litigation and the delay caused by the plaintiff in filing the suit, it cannot be said that if the operation of the impugned order is stayed during the pendency of these appeals, the same would cause such injuries to the plaintiff that cannot be compensated,

if ultimately these appeals fail.

12. So far the acts of the defendants in not obeying the injunction granted is concerned, it is relevant to notice that in CMA No. 816/2003 on 14.11.2003, following order was passed when appearance was put on behalf of the plaintiff in caveat particularly in relation to the proceedings under Order 39 Rule 2-A CPC that have already been filed before the trial Court,-

Mr. Chhangani, counsel appearing for Mr. JP Joshi, who has entered caveat, states that Mr. Joshi is not coming to Court because of his son's marriage scheduled to be held on 17.11.2003.

Mr. RK Thanvi, learned Counsel for the appellant submits that respondents have filed contempt petition under 0.39. R.2-A CPC before the trial Court at Udaipur and next date in the matter is 17.11.2003 for filing reply to the contempt petition.

Mr. Chhangani, submits that respondents before trial Court would not insist to file reply on next date and matter may be posted on 21.11.2003, so that Mr. Joshi can argue the matter.

List on 21.11.2003 alongwith CFA No. 152/2003, CR No. 633/2003 and Civil Transfer Pet. No. 11/2003.

13. It appears that the observations so made in the order dated 14.11.2003 were taken as an interim order and hence from time to time the interim order was continued by the Court and then the matter was heard after receiving the record though later on the said interim order was not continued as such.

14. In the circumstances of the case and on the balance of equities, it appears appropriate that the operation and effect of the impugned order dated 30.07.20003 ought to be remain stayed during the pendency of these appeals.

Hence:

(a) operation and effect of the impugned order dated 30.7.2003 shall remain stayed during pendency of these appeals;

(b) it shall be required of the appellants to place on record the entire details of their manufacturing and selling activities from 30.7.2003 till this date with specific reference to their accounts within 30 days from today to this Court supported by specific affidavits;

(c) it shall also be required of the appellants to continue to submit quarterly details of their manufacturing and selling activities with specific reference to their accounts, after every three months hereafter; and,

(d) it shall also be required of the appellants to submit specific undertaking to comply with the final orders to be passed in these appeals within 30 days from today.

15. By a separate order made today in S.B. Civil Revision Petition No. 633/2003, the revision petition submitted by the defendant Bharat Lal against rejection of an application under Order 7 Rule 11 CPC has been dismissed and this Court is clearly of view that the civil suit in question ought to be proceed expeditiously. Therefore, record of the civil suit be sent back immediately to the learned trial Court. The parties are directed to remain present before the trial Court on 8.12.2006. It shall be required of the learned trial Court to proceed with the suit as expeditiously as possible.

16. It shall also be permissible for the parties to apply for early hearing of these appeals.