

(1995) 07 DEL CK 0093

In the Delhi High Court

Case No : Civil Miscellaneous (Main) Appeal No. 295 of 1994

Bindal Toys

APPELLANT

Vs

Gemini Toys

RESPONDENT

Date of Decision : 01-07-1995

Acts Referred:

Trade and Merchandise Marks Act, 1958 — Section 21

Citation : (1995) 2 ARBLR 292 : (1995) 34 DRJ 285

Hon'ble Judges : Usha Mehra, J

Bench : Single Bench

Advocate : K.B. Bansal and V.P. Ghiraya, for the Appellant;

Judgement

Usha Mehra, J.

(1) M/S Bindal Toys has assailed the order dated 22nd February, 1994 passed by the Deputy Registrar, Trade Marks, Delhi (hereinafter called the Registrar). The order has been assailed primarily on the ground that the Registrar while disposing the opposition application of the appellant, ignored the fact that the appellant had been using the said mark since 1st April, 1975. The said mark became distinctive and associated with the goods of the appellant. Now if the respondent is permitted to adopt the impugned trade mark, the common purchaser will be deceived and get confused. The device of globe in both the marks is identical besides the letters Btm and Gtm will create confusion. Moreover, the get-up, make-up and lettering style of the appellant's trade mark and the proposed by respondent have been ignored by the Registrar, hence the appeal.

(2) In order to appreciate the contentions raised, the brief facts essential for the determination of the same are that the appellant lodged an opposition to the application filed by the respondent in Class 28 in respect of the specific toys alleged to be manufactured by the respondent. On the application being moved by the respondent the mark of the respondent was advertised in the Trade Mark

Journal on 1st November, 1990. The appellant filed the opposition raising, inter alia, the ground that the appellant had been engaged in the manufacturing of toys under the name and style of M/s Bindal Toys and thus the appellant was the proprietor of the trade mark "B.T.M. label consisting of globe and two boys holding bigul" in respect of toys and playthings. This trade mark was adopted by the appellant on 1st April, 1975. It had been in continuous use by the appellant. The appellant earned goodwill in the business, hence applied for registration of the trade mark under Class 28 which was duly accepted for registration. It was advertised on 1st December, 1989. The mark "B.T.M. label consisting of globe and two boys holding bigul" was duly registered as an artistic work under the Indian Copyright Act and thus the trade mark of the appellant became distinctive and associated on account of its long, continuous, extensive and exclusive user. The appellant had widely advertised this trade mark, Therefore, when the respondent applied, the appellant challenged the same. In reply the respondent denied all the material averments of the appellant before the Registrar. The respondent took the plea that the appellant was the proprietor of the trade mark "GEMINI" with the device of two lions and globe. The appellant's goods are demanded and recognised by the public under the trade mark "GEMINI".

(3) That both the parties were given opportunity by the Registrar to lead evidence by way of affidavits. They did file affidavits by way of evidence. The Registrar by the impugned order came to the conclusion that there was no force in the opposition. The appellant proceeded to register the trade mark of the respondent.

(4) The short point for consideration is what was the opposition before the plan filed by the present appellant? Was it the case of the appellant before the Registrar that the trade mark "B.T.M." is deceptively similar to the mark "G.T.M." used by the respondent or was it the device of "globe" or "two boys holding the bigul". Perusal of the opposition was filed as Form TM-5 shows that the appellant had alleged himself to be the proprietor of the trade mark "B.T.M. label consisting of two boys holding bigul". It was this trade mark used by the appellant which was infringed by the respondent/ applicant. This was the attack before the Registrar. It was nowhere the case set up by the appellant that the device of "Globe" had been infringed or "Globe" was the salient feature of his trade mark. Nor was it the case of the appellant that trade mark of the respondent on account of use of "Globe" made his products deceptively similar to that of the appellant or would create confusion in the mind of the common purchaser. In the absence of any such pleadings, it does not become for the appellant to say that he challenged the use of the device of "Globe" before the Registrar and he ignored this part of his arguments. The appellant in his opposition before the Registrar had been harping that the trade mark "B. T.M. label consisting of globe and two boys holding the bigul" and that use of "G.T.M. & Lions" would create deception in the mind of the purchaser. When evidence was filed by the appellant before the Registrar under Rule 53 by way of affidavit. In paras 3 and 4 of the same the grounds taken were as under, "the appellant firm was manufacturing

toys and play things and have been using the trade mark "Bindal Toys with Device of Two Boys Holding Bigul" in respect thereof. It was further pleaded that "the opponent firm adopted the said trade mark on 1st April, 1975 and have been continuously using the same". In para No.4 of the said affidavit filed in support of the opposition, signed by Mr.Mahesh Kumar proprietor it was pleaded that "the trade mark "Bindal Toys with Device of Two Boys Holding Bigul" in its distinctive get up, make-up has already become distinctive and associated with the aforementioned goods on account of its long, continuous, extensive and exclusive user thereof and the goods bearing the said trade mark are highly amended in the markets on account of standard quality". It was further pleaded that sh.Rolic at large identifies and associates the said trade mark with the aforementioned goods of opponent's firm. It was further pleaded that "his firm claims to be the proprietor of the said trade mark on accounts of its prior honest adoption and continuous user and in fact the trade mark "Bindal Toys with Device of two Boys Holding Bigul" has become a distinctive indicium of his firm in relation to the aforesaid goods" (Underlining mine). Reading of this evidence would show that the appellant was more concerned with the trade mark "Bindal Toys with Device of Two Boys Holding Bigul" and not with the "Globe". Mr.Bansal now wants this Court to hold that there was an infringement of the device Globe. This was not part of case set up before the Registrar, Therefore, in the absence of setting up such a case before the Registrar, Mr.Bansal cannot be permitted to urge new point at this stage. The Registrar by the impugned order rightly concluded that the trade mark which the respondent wanted to get registered i.e. "GEMINI Toys and the letter G Tm with the device of two lions" was quite distinctive. These have no similarity except in the trade of the appellant two boys with bigul are standing on the "Globe" while in the trade mark of the respondent two lions facing, each other are standing on the globe. The Registrar, Therefore, rightly observed that the comparison of these two trade marks would clearly denote that the essential feature of the opponents mark is "BINDAL" and device of two children harping the and that of the applicants mark is "GEMINI" and device of two lions. Here the section of deceptively similar did not arise. In fact there is no similarity at all. Moreover, the Registrar also took into consideration the fact that the Globe is commonly used and there is a disclaimer. In this view of the matter, I find no infirmity in the order. Even otherwise to a naked eye the trade mark which is alleged to be that of the appellant i.e. "BINDAL Toys with two boys standing on the globe and harping the bigul" is quite distinctive from the trade mark "GEMINI toys with two lions facing each other putting their foot on the globe". A customer cannot be deceived by these two distinctive trade marks. There is no similarity in the essential features of these two trade marks or their device except the globe for which there is a disclaimer.

(5) I have seen both the trade marks even from a casual glance of the two trade marks it is clear that these are quite distinctive and dissimilar to each other. This conclusion is arrived at after taking into consideration both the trade marks as a whole. The Registrar, Therefore, rightly concluded that there cannot be any

deception if one keeps both the trade marks in front of him. Even otherwise from the evidence filed under Rule 53, the appellant had been opposing the application of the respondent on the sole ground of mis-user of his trade mark "BINDAL Toys with the device of globe consisting two boys holding bigul". The opposition was not on account of the use of "Globe". These toys are normally purchased by the children. To my mind, even a child from the very look of these trade marks will be able to draw distinction and find that both are distinct and dissimilar.

(6) MR.BANSAL, to support his contention that "Globe" being the essential feature of his device hence the use of "Globe" by the respondent would create confusion placed reliance on the decision of the Supreme Court in the case of Parle Products (P) Ltd. Vs. J.P. and Co., Mysore, . In that case the Apex Court observed that to arrive at a conclusion whether one mark is deceptively similar to the other, the Court should not place the marks side by side to find out if there are any differences in the design and if so, whether they are of such character as to prevent one design from being mistaken for the other. I am afraid these observations are not applicable to the facts of this case. The Registrar did not scrutinise the two trade marks to compare the similarities or dissimilarities. He compared the trade mark from the do view point of an ordinary customer to see whether from the overall view a customer who buys these toys would be misled to find whether these are identical or not. Similarly, reliance by Mr.Bansal on the decision of this Court in the case of Camlin Private Limited Vs. National Pencil Industries, is also not helpful to him. The facts of that case are totally different. In that case this Court was considering the trade marks of pencils and cartons relating to that of the plaintiff and the defendant. There the plaintiff's trade mark was "Camlin Flora" and that of the defendant was "Tiger Flore". The court found that there was a similarity in both the pencils because the "FLORA" on the plaintiff's pencil, its design, colour combination and the artistic feature of the cartons was such that the children could have got confused. The distinctive and essential feature of the plaintiff's Flora Pencils was the deciding factor which was used by the defendant. But in the present case "Globe" is not the essential feature of his trade mark. Therefore, the observation in Camlin's case is of no use to the appellant. Similarly reliance by the appellant on the case of M/s Vrajlal Manilal and Co., Vs. M/s N.S.Bidi Co. and ors. reported in Air 1987 Del 312 is misplaced. In that case the defendant was using "12" as his trade mark whereas the plaintiff was selling bidis with figure "22" as his trade mark on label. Both the plaintiff and the defendant were selling similar goods. The Court found that the colour scheme, get-up and lay out of both labels was identical and, Therefore, there was an infringement of trade mark. There the use of "12" and figure "22" was considered could create confusion. In another case relied by Mr.Bansal namely of Prem Nath Mayer Vs. The Registrar of Trade Marks & ors. reported in 1982 Ptc 239, the Court was dealing with a trade mark consisting of the words "Ma Durga Brand" and the device of goddess seated on a lion and the trade mark of the respondent was "Lion Brand With the device of

Lion". After comparing these two trade marks, the Court came to the conclusion that the main feature of the two marks was "Lion". Hence concluded that it would deceive the mind of the purchaser. In the present case "Globe" is not the main feature of the two trade marks. The main feature of the appellant's trade mark is Two boys holding bigul" whereas that of the respondent's is "two lions facing each other". There is no similarity in the two trade marks.

(7) In the words of Chief Justice Mahamedali Curreem Chagia in the case of James Chadwick and Bros. Ltd. Vs. The National Sewing Thread Co. Ltd., :

(F)The Registrar, in coming to the conclusion, whether a trade mark should or should not be registered, exercises the discretion vested in him by statute and the Court in appeal should always be extremely loath to interfere with that discretion. Discretion exercised by the Registrar should not be interfered with unless the Court comes to the conclusion that the Registrar in coming to the conclusion that he did was clearly wrong or patently in error.

(G)In deciding whether a particular trade mark is likely to deceive it with the trade mark which is already registered and whose proprietor is offering opposition to the registration of the former trade mark. What is important is to find out what is the distinguishing or essential feature of the trade mark already registered & what is the main feature or the main idea underlying that trade mark & if it is found that the trade mark whose registration is sought contains the same distinguishing or essential feature or conveys the same idea then ordinarily the registrar is right if he comes to the conclusion that the trade mark should not be registered. The real question is as to how a purchaser, who must be looked upon as an average man of ordinary intelligence, would re-act to a THERE may particular trade mark, what association he would form by looking at the trade mark, & in what respect he would connect the trade mark with the goods which he would be purchasing.

THERE may be cases where dissimilarity in the object represented may be the deciding factor. If, for instance, particular class of goods are sold by several dealers, all under different kinds of Eagle trade marks, then the purchaser is expected to know the difference between one trade mark and another, knowing as he does that more than one person sells goods under the same appellation. But where only one dealer sells the class of goods under the Eagle Brand & his goods are known as Eagle or Eagley, then the position is very different, & any attempt to sell goods under a trade mark which fixes in the mind of the purchaser the association of an Eagle would not be justified."

(8) Relying on the observation of Chief Justice Chagla one can easily say that by seeing these trade marks, a man of ordinary intelligence, to my mind, will not get deceived simply because "globe" Find place in both the trade marks. "Globe" in fact is not the main feature of appellant's trade mark. That is the reason in his evidence file " under Rule 53 he only relied on the use of "B.T.M." or "Bindal Toys label consisting of two boys holding bigul". This shows the main feature to be

"Bindal Toys or two boys holding bigul" and not the "Globe". Therefore, the Registrar rightly concluded that there was no similarity in these two trade marks.

(9) The opinion of the Registrar should not be lightly disturbed because he has an expert knowledge in the matter. To arrive at this conclusion reference can be made to the observations of the Supreme Court in the case of K.R. Chinna Krishna Chettiar Vs. Shri Ambal and Co., Madras and Another, .

(10) For the reasons stated above, I Find no infirmity in the order of the Registrar and no merits in the petition. The petition is accordingly dismissed.