

(1996) 03 MAD CK 0121
In the Madras High Court

Chandrasekharan

APPELLANT

Vs

Babu Machine works, a partnership firm

RESPONDENT

Date of Decision : 25-03-1996

Acts Referred:

Citation : (1996) 1 MLJ 613

Hon'ble Judges : Govardhan, J

Bench : Division Bench

Judgement

Govardhan, J.—First defendant is the appellant.

2. The averments in the petition are briefly as follows : The petitioner is carrying on business in hand pumps for pumping water under the trade mark "Sun" which appears on the outer surface of the barrel of the pump. It is a simplified figure of the "Sun". The trade mark is within a circle from which lines representing light rays emanate outwards and inside the circle, the word "Sun" is written in Roman Capital letters. The trade mark has been registered by the petitioner on 1.3.1983 under Registration No. 322007. Even before the registration of the mark, he was manufacturing and marketing the same. The plaintiff belongs to the family of Adithans Industrialists in Tirunelveli District. The meaning of the word "Adithan" is "Sun". The Sun Mark was a strong persuasive factor at the point of sale. The pumps manufactured by the petitioner have enjoyed a good reputation and wide market in the District of Tirunelveli and outside. The first respondent was formerly an employee of the petitioner. After leaving the services of the petitioner, the first respondent has made and marketed hand pumps carrying on a trade mark which is deceptively similar to the petitioner's trade mark, with the intention of getting profits by colourable imitation by the petitioner's trade mark. The trade mark of the first respondent is a symbolical representation of the "Sun" consisting of the upper half of a circle from which straight lines representing light rays emanate outwards. Below the figure of the Sun, the word "Yamuna" is written. One of the political parties in Tamil Nadu has adopted "Sun" as their election symbol consisting of the upper half of a circle with rays

emanating therefrom. Millions of people in Tamil Nadu are associated with the same. The trade name "Yamuna" does not bear any connection with the "Sun". A purchaser of hand pump manufactured by the petitioner is often a villager not having high education. It is easy for the respondents to pass off their pumps to these purchaser showing the circle with lines emanating as rays. By their conduct, the respondents are imitating the pumps manufactured by the petitioner and are passing off the same. Therefore, the petitioner has filed this petition for injunction and for accounting.

3. The first respondent in his counter contends briefly as follows: The petitioner has no exclusive right to use the trade mark in relation to hand pumps. "Sun" is common to all. It is not true to say that it has become associated with the petitioner's goods in the mark. The trade mark used by the first respondent is not similar to that of the petitioner. There are no similarities between them. It is a semi-circle with some spokes placed on the curve with the name Yamuna underneath. The letter is inside the curve. The first respondent's product is in the mark for a considerable period with this trade mark. There is no similarity between the trade mark of the petitioner and the respondent visually and phonetically. The first respondent's trade mark is not "Sun". There is no confusion between the two marks among the public. Nobody can mistake one for the other. The price of the pumps sold by the respondents is more than that of the petitioner. The respondent has secured a good market. With the intention of causing loss to the first respondent, this petition has been filed and it is liable to be dismissed.

4. The second respondent has contended in his counter that they casts and supplies machine parts to industrial establishments including "Sun Paper Mills" and the second respondent is also selling hand-pump in the name of "Selvan Handpumps". He has also contended that there is no cause of action against the second respondent.

5. The third respondent in his counter has stated that it is manufacturing textile parts, sanitary fittings and hand pumps as per the orders placed with them by third parties and they have nothing to do with the author of the size, get up design, etc. It is also stated by the third respondent that the symbol in the trade mark of the petitioner and the first respondent do not resemble with each other and there is no infringement. It is also stated that he has not passed off the hand pumps.

6. On the above pleadings, the trial court has held that there is a clear infringement of the trade mark by the first respondent and has granted a decree for permanent injunction against the first respondent.

7. Aggrieved over the same, the first respondent has come forward with this appeal.

8. The learned Counsel appearing for the appellant has argued that the trial court has committed an error in holding that the petitioner has got an exclusive right

to use the figure "Sun" in the hand pumps and that the hand pumps used by the plaintiff petitioner is not in any way similar to the hand pumps manufactured and marketed by the first respondent and that there is no infringement of the trade mark of the petitioner. It is also argued by the deceptive similarities between the two hand pumps manufactured by the petitioner and the first respondent and the judgment of the trial court is therefore liable to be set aside. The respondent herein has filed the petition for declaration and injunction contending that he belongs to the family of "Adithans" and all the businesses are carried in the name of Adithan, denoting "Sun" and they have established a market both in Tirunelveli District and outside for the pump-set manufactured and marketed by them and the first respondent who was an employee under the petitioner, has started manufacturing and marketing the hand-pumps using a trade mark which is similar and deceptive to that of the petitioner and thereby illegally passing off his product as if it is the product of the petitioner and thereby acquires an illegal profit and therefore the first respondent should be restrained from doing so and he should be asked to render accounts for the business carried on by him using the particular trade name. According to the learned Counsel for the appellant the respondent claims the figures of sun as his trade mark whereas the trade mark of the appellant is "rising sun" and there are very many variations among the two products which would show that there is no deceptive similarity between the two and finding of the trial court is erroneous. He has argued that the petitioner cannot claim any exclusive right to the word "Sun", since it is common to all and even worshipped as God by Hindus.

9. The learned Counsel appearing for the respondent would on the other hand contend that the petitioner claims the trade mark "Sun" as representing the family name of the petitioner viz., "Adithan" and the purchasers who came to purchase hand-pumps are misled to believe that the product manufactured by the first respondent is the product manufactured by the famous family of Adithan in Tirunelveli District and taking advantage of the same, the appellant is getting an illegal profit and therefore the judgment of the trial court is well-founded.

10. P.W. 1 is one of the partners of the petitioner's firm and he has stated that the name "Adithan" belongs to their family and number of businesses are carried on under the names representing "Sun". He has given a list of such businesses also. He has stated that his father and his younger brother are running Paper Mill under the name of "SUN PAPER MILL" in Seranmadevi, his cousin Sivanthi Adithan is running a Transport Company under the name of "Sun Transport" his another cousin is running a Chemical Factory under the name of "Kadhiravan Chemicals" and all the businesses carried on by their family are named after "Sun". The evidence of P.W. 1 shows that for the reasons stated by him, he is carrying on the business of manufacturing and sale of handpump also under the name of "Sun". The trade mark of the petitioner is a circle from which lines are drawn to show that rays emanated indicating "Sun". The first respondent was an employee under the petitioner is not in dispute. After leaving the services of the petitioner, alone, he has started his business of manufacturing and marketing

hand pumps is also not in dispute. The figure on the pump manufactured by the first respondent is a half circle with rays emanating from it. It is representing as spokes and the figure does not represent "Sun". A mere look at the figure on the pump manufactured by the first respondent would show that it is a figure of a "Rising Sun". The petitioner has referred to the political party in Tamil Nadu viz., D.M.K., having "Rising Sun" as their symbol and he would contend that anybody who looks at the figure would only take it for granted as the figure of a sun and not otherwise. This version of the petitioner cannot be said to be without any merit since the people in Tamil Nadu are aware that the symbol of the D.M.K. Party is "Rising Sun". The figure on the hand pump manufactured by the first respondent is similar to the figure of the symbol of the D.M.K. Party and there is every possibility of anyone to take it as a figure of "Rising Sun", on seeing the figure in the hand-pump set of the first respondent. Whether it is a figure of a full Sun or figure of a half Sun, the fact remains that there is every possibility of a prospective purchaser to mistake the product manufactured and marketed by the first respondent and to believe that it is the product of the petitioner who are having the name "Sun" for many of their industries and businesses. The contention of the first respondent that it is only spokes, is not convincing and acceptable.

11. It is also contended that in the semi-circle of the figure of the first respondent, the letter Y is shown representing Yamuna. The word "Yamuna" is also written under the same half circle. "Yamuna" is the name of a River, is not in dispute, There is no connection between the hand-pump set marketed by the first respondent with the figure of a "Rising Sun" and the word "Yamuna". It cannot be expected that a purchaser of this pumpset will be purchasing the same under the belief that there will be copious supply of water in this hand-pump as in the river Yamuna. Therefore, the figure and the trade name of the first respondent does not appear to be having any connection among them.

12. The learned Counsel appearing for the appellant has also referred to the difference in the nut of the piston, the colour of the nut, the differences in the height of the barrel, the length of the same etc., and would argue that even a look at the two pumps would show that there is no deceptive similarity between the two. The learned Counsel appearing for the respondent would draw the attention of this Court to the evidence of P.W. 2 who has stated that the pump purchased by a purchaser under the belief that it was the product of the petitioner has been brought to him for repairs and it was then found out by him that it is not the pump manufactured by the petitioner and sold by him in the mark and this information was also communicated to the purchaser and he has refused to repair the same. The argument of the learned Counsel appearing for the appellant that differences between the two pumps will be sufficient to hold that there is no deceptive similarity cannot be appreciated in the light of the evidence of P.W. 2 which shows that at-least one person has purchased that pump manufactured by the first respondent as the one manufactured by the petitioner on account of the deceptive similarity between the two.

13. It is an established principle of law that in deciding a question of similarity between the two marks, the marks have to be considered as a whole and we have to approach it from the point of view of a man of an average intelligence and with imperfect recollections. It has been held in the decision reported in *Hiralal Parbhudas Vs. Ganesh Trading Company and Others*, as follows:

In deciding the question of similarity of two marks, the following well established principles are to be observed: (i) marks are remembered by general impressions or by some significant detail rather than by a photographic recollection of the whole, (ii) overall similarity is the touchstone, (iii) marks must be looked at from the first impression of a person of average intelligence and imperfect recollections, (iv) overall structure, phonetic similarity and similarity of idea are important and both visual and phonetic tests must be applied, (v) marks must be compared as a whole, microscopic examination being impermissible, and (vi) the broad and salient features must be considered for which the marks must not be placed side by side to find out differences in design in addition, the nature of the commonness the class of purchasers, the mode of purchase and other surrounding circumstances, must also be taken into consideration.

In the decision in *National Match Works, Sivakasi Vs. S.T. Karuppanna Nadar (Died) and Others*, , a Division Bench of this Court has held that there is overall similarity between the two marks, the main feature of which is the squirrel, whether it be the squirrel sitting on its hind legs and keeping its forelegs up with a nut in those legs or whether it be standing on all its legs on a smaller or longer branch of a tree. Proof of actual deception is not necessary. The two marks bear an overall similarity as would be likely to mislead a person usually dealing with the one to accept the other if offered to him. When in the decision. The Division Bench has held that there is a deceptive similarity between the two squirrels in different poses as described by Their Lordship in the above decision, the contention of the leaned counsel appearing for the appellant that the figure of the "Sun" of the petitioner is full "Sun" with rays emanating from it and the figure of respondent is a half sun or rising sun with spokes protruding from it and therefore, it must be held that there is no similarity is not convincing and acceptable.

14. In the decision reported in *Parle Products (P) Ltd. Vs. J.P. and Co., Mysore*, , it has been held as follows:

To decide the question as to whether the plaintiffs' right to a trade mark has been infringed in a particular case, the approach must not be that in an action for passing off goods of the defendant as and for those of the plaintiff. In order to come to the conclusion whether one mark is deceptively similar to another, the broad and essential features of the two are to be considered. They should not be placed side by side to find out if there are any differences in the design from being mistaken for the other. It would be enough if the impugned mark bears such an overall similarity to the registered mark as would be likely to mislead a person usually dealing with one to accept the other if offered to him. It is of no

use to note on how many points there is similarity and in how many others there is absence of it.

The learned counsel appearing for the appellant only wants the court to place both the material objects viz., M.O. 1 and M.O. 2, the products of the petitioner and the first respondent and compare them and see how many differences are there in the design and get-up, of the two. But this method of comparison between the two material objects of the petitioner and the first respondent is not in accordance with the rule of law laid down by the Apex Court in the above decision. Therefore, I am of opinion that even if there are minor differences between the two products manufactured by the petitioner and the first respondent, they are not sufficient to hold that there is no deceptive similarity between the two and they are not likely to mislead a person usually dealing with hand pumps manufactured by the petitioner to accept the hand pump manufactured by the first respondent, if offered to him, since it is common knowledge that hand pumps are purchased by agriculturists and villagers, who do not have sufficient education to differentiate between the two products. It is thus seen that when the judgment of the trial court is analysed in the light of the well established principles of law, which I have referred above, we have to come to the conclusion that the trial court has rightly come to the conclusion that there is a clear infringement of the trade mark by the first respondent and therefore, the plaintiff is entitled to the declaration and injunction prayed for, against the first respondent. The judgment of the trial court is therefore well-founded in my opinion and there is nothing to interfere with the same.

15. In the result, the appeal is dismissed. No costs.