
(2023) 01 DEL CK 0083

In the Delhi High Court

Case No : First Appeal From Order (OS) (COMM) No. 2 Of 2023

Corza International And Ors

APPELLANT

Vs

Future Bath Products Pvt Ltd And Anr .

RESPONDENT

Date of Decision : 12-01-2023

Acts Referred:

Trade Marks Act, 1999 — Section 28(1), 28(3), 30(2)(e), 124, 124(1), 124(5)

Citation : (2023) 01 DEL CK 0083

Hon'ble Judges : Manmohan, J;Saurabh Banerjee, J

Bench : Division Bench

Advocate : Jayant Kumar, Umesh Mishra, Satish Kumar

Final Decision : Dismissed

Judgement

Manmohan, J

C.M.Nos.1288-1289/2023

Exemption allowed, subject to all just exceptions.

Accordingly, the applications stand disposed of.

FAO(OS) (COMM) 2/2023 & C.M.No.1287/2023

1. Present appeal has been filed challenging the order dated 4th November, 2022 passed by learned Single Judge in CS (COMM) No.461/2020.

2. Learned counsel for the appellants/defendants states the learned Single Judge has erred in granting interim injunction in favour of the respondent no. 1/plaintiff without appreciating that the appellants are primarily engaged in the field of manufacturing and selling of water closets and ancillary products since 1999. He contends that the appellants' products are completely different from the respondents' products. He emphasises that the two marks in question, namely, CORZA and CORSA, are different and their area of physical operation is also different. He states that while the business of the appellants is confined to the

State of Kerala, the respondents/plaintiffs have no presence in Kerala. Therefore, according to him, there is no question of loss of market share or customers being confused.

3. He contends that the appellants and their predecessor have been using the mark since 1999 continuously and bonafidely and due to such extensive use, the appellants hold goodwill and reputation for their trademark CORZA. He further states that though the respondent no. 1 claims to have started using the name since 1998, yet they failed to produce any document to sustain their claim.

4. Learned counsel for the appellants lastly submits that as the appellants are registered owner of the mark CORZA in Class 19, the learned Single Judge in view of Sections 28(3) and 30(2)(e) of the Trade Marks Act, 1999 could not have confined the operations of the appellants to the State of Kerala and that too with regard to Class 19 category goods.

5. Having perused the paper book, this Court is in agreement with the prima facie view of the learned Single Judge that the two marks in question are phonetically, structurally and visually similar. This Court is also in agreement with the prima facie finding of the learned Single Judge that the respondent no.1/ plaintiff no.1 is the prior user of the mark in question as it has produced documents showing use of the mark CORSA since 2009, whereas the appellants have placed on record documents showing use of their mark CORZA only since 2014.

6. The contention of the appellants that they are confined to the State of Kerala and that too with regard to Class 19 goods is not correct as the prime reason for institution of the suit by the respondents before the learned Single Judge was that on their Facebook page, the appellants had themselves stated that they would be shortly expanding their business to sanitary wares, which would have included respondents/plaintiffs' products.

7. Further, the consistent view taken by this Court is that the registered proprietor of a trademark can sue another registered proprietor of a trademark alleging deceptive similarity and the Courts are competent to grant an ad-interim injunction. The Division Bench of this Court in *Raj Kumar Prasad & Anr. Vs. Abbott Healthcare (P) Ltd.*, 2014 SCC OnLine Del 7708 has held as under:-

"1. The question: Whether the registered proprietor of a trademark can sue another registered proprietor of a trademark alleging deceptive similarity keeps on arising in this Court. The consistent view taken by learned Single Judges is that such a suit would be maintainable and thus by way of an interim injunction the defendant can be restrained from marketing goods under the offending trademark. The question has arisen once again in the suit filed by Abbott Healthcare Pvt. Ltd. and the antagonists are Raj Kumar Prasad and Aicon Pharmaceuticals Pvt. Ltd.

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15. It is no doubt true that a reading of sub-Section 1 of Section 28 of the Trademarks Act, 1999 would evidence a legal right vested in the registered proprietor of a trademark to exclusively use the same in relation to the goods or services in respect of which the trademark is registered and to obtain relief in respect of infringement of the trademark. It is also true that a mere reading of sub-Section 3 of Section 28 of the Trademarks Act, 1999 would evidence a mutually exclusive right in two or more registered proprietors of trademarks which are identical with or nearly resemble each other to use the trademarks; none being in a position to sue the other, and each being empowered to sue other persons.

16. But what does Section 124 of the Trademarks Act, 1999 say? And in what manner does it affect the rights conferred under Section 28?

17. The guiding star being the principle of law: every attempt has to be made, as long as the language of a statute permits, to give effect to every phrase and sentence used by the legislature, and if there emerges an apparent conflict, the duty of the Court would be to iron out the creases and interpret the provisions harmoniously so that the provisions are given effect to.

18. Sub-Section 1 of Section 124 of the Trademarks Act, 1999 would guide us that it contemplates a suit for infringement of a trademark on the allegation of invalidity of registration of the defendant's mark and even includes a case where a defendant pleads invalidity in the registration of the plaintiff's trademark. In such a situation the legislative intent clearly disclosed is, as per sub-Section 5 of Section 124, to stay the suit, to enable either party to take recourse to rectification proceedings before the Registrar of Trademarks, but after considering what interlocutory order needs to be passed. Sub-Section 5 reads: "The stay of a suit for the infringement of a trademark under this Section shall not preclude the Court for making any interlocutory order including any order granting an injunction direction account to be kept, appointing a receiver or attaching any property, during the period of the stay of the suit"

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20. Ex-facie there is visual and phonetic deceptive similarity in the trademark 'AMAFORTEN' in comparison with the trademark 'ANAFORTAN'. It has to be kept in mind that the competing goods are pharmaceutical preparations, the class of the goods is the same; the consumer is the same and the trade channel is the same. Concededly through its predecessors-in-interest Abbott has inherited the good will and reputation in its trademark 'ANAFORTAN' and would be entitled to protect the same. Whereas through its predecessors-in-interest Abbott is in the market since the year 1988 defendant entered the market somewhere in the year 2012 when the suit was filed. We note that the defendant has consciously not disclosed in the written statement the day it started selling the goods in the market. From the documents filed by the defendants we find that it applied to the Registrar of Trademarks for registration of the trademark 'AMAFORTEN' on

June 17, 2009 and was granted registration on July 12, 2011.

21. Tested on the legal principles laid down by the Supreme Court in the decision reported as 1990 (Supp.) SCC 727 Wander Ltd. & Anr. Vs. Antox India P.Ltd. we find no infirmity in the view taken by the learned Single Judge and thus would dismiss the appeal challenging the order dated April 25, 2014 allowing IA No.23086/2012 filed by Abbott."

8. Accordingly, the submission that the learned Single Judge could not have made the interim arrangement confining the appellants to sell their goods under Class 19 category and that too in the State of Kerala is untenable in law.

9. This Court also finds that the discretion exercised by the learned Single Judge in the impugned order is neither arbitrary nor capricious or perverse or contrary to settled principle of law. In Wander Ltd Vs Antox India Pvt Ltd . 1990 (Suppl) SCC 727, the Supreme Court has held as under:-

"14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by the court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the Trial Court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion."

10. In view thereof, this Court finds no ground to interfere with the impugned order. Accordingly, the present appeal along with pending application stands dismissed.